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Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

STUART L. STEIN, ESQUIRE,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Five questions are presented:

1. Is aggravation of attorney discipline resulting in disbarment based in part on exercise of core political speech by an attorney on a blog or web site a prohibited official reprisal and a violation of the First, Fifth and Fourteenth Amendment Due Process clauses under *Hartman v. Moore*, 547 U.S. 250 (2006) and *Crawford-El v. Britton*, 523 U.S. 574 (1998)?

2. Is a state professional discipline proceeding which provides pre-filing discovery only in favor of the prosecution – a "one-way" street – while providing no post-filing discovery to the accused attorney resulting in disbarment a violation of the Fifth and Fourteenth Amendment Due Process clauses under *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Wardius v. Oregon*, 412 U.S. 470 (1973)?

3. Is the failure to identify and connect alleged specific wrongful conduct to enumerated violations of Rules of Professional Conduct in a Specification of Charges where no discovery is granted to the accused attorney resulting in disbarment a violation of the Fifth and Fourteenth Amendment Due Process clauses under *In Re Ruffalo*, 390 U.S. 544 (1968), *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Wardius v. Oregon*, 412 U.S. 479 (1973)?

QUESTIONS PRESENTED – Continued

4. Is the absence of any allegations in an attorney discipline Specification of Charges of a failure to perform duties in a proceeding where no discovery is granted to the accused attorney when, after the fact, identification of specific duties and their failure to be performed is the basis for professional discipline resulting in disbarment a violation of the Fifth and Fourteenth Amendment Due Process clauses under *In Re Ruffalo*, 390 U.S. 544 (1968), *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Wardius v. Oregon*, 412 U.S. 470 (1973)?

5. Are adversarial, state attorney disciplinary proceedings of a quasi-criminal nature with proofs determined by a "preponderance" instead of a "clear and convincing" evidence standard resulting in disbarment which provide pre-filing discovery only in favor of the prosecution – a "one-way" street – while providing no post-filing discovery to the accused attorney a violation of the Fifth and Fourteenth Amendment Due Process clauses under *In Re Ruffalo*, 390 U.S. 544 (1968), *Addington v. Texas*, 441 U.S. 418 (1979), *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Wardius v. Oregon*, 412 U.S. 470 (1973)?

PARTIES TO THE PROCEEDINGS

Petitioner: (respondent below)

STUART L. STEIN, ESQ.

Represented by Stuart L. Stein, Esq., The Stein Law Firm, Post Office Box 29598, Santa Fe, New Mexico 87592

Respondent: (petitioner below)

DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Represented below by Deputy Disciplinary Counsel Joel L. Widman, Office of Disciplinary Counsel, 400 Gold Avenue, Southwest, Albuquerque, New Mexico 87102

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	v
TABLE OF AUTHORITIES	x
CITATIONS FOR OPINION BELOW	1
BASIS OF JURISDICTION OF COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF WRIT	10
I. REVIEW IS WARRANTED FOR FIRST AMENDMENT ISSUE	11
II. REVIEW IS WARRANTED FOR DUE PROCESS ISSUES	13
A. First Amendment Hearing	14
B. Specificity of Charges – Violation of Court Order	15
C. Specificity of Charges – Fraud and Misrepresentation	18
D. Due Process Discovery; *Mathews v. Eldridge* Balancing	20
E. Clear and Convincing Evidence Is Required in Quasi-Criminal Proceedings	25
CONCLUSION	27

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

Appendix A	Opinion of Supreme Court of New Mexico entered on February 20, 2008. *In the Matter of Stein,* 2008-NMSC-013, 117 P.3d 513	App. 1
Appendix B	Decision of the Hearing Panel of August 7, 2007	App. 43
Appendix C	Hearing Committee's Findings of Fact and Conclusions of Law and Recommendation for Discipline of April 4, 2007	App. 49
Appendix D	California Rules of Practice of State Bar Court, Rule 1201	App. 61
Appendix E	California Rules of Practice of State Bar Court, Rule 1202	App. 62
Appendix F	Rules Regulating The Florida Bar Rule 3-7.6	App. 64
Appendix G	N.M.R.A. 17-105, Rules Governing Discipline	App. 75
Appendix H	N.M.R.A. 17-301, Rules Governing Discipline	App. 79
Appendix I	N.M.R.A. 17-306, Rules Governing Discipline	App. 81
Appendix J	N.M.R.A. 17-307, Rules Governing Discipline	App. 87

TABLE OF CONTENTS – Continued

		Page
Appendix K	N.M.R.A. 17-309, Rules Governing Discipline	App. 91
Appendix L	N.M.R.A. 17-313, Rules Governing Discipline	App. 95
Appendix M	N.M.R.A. 17-314, Rules Governing Discipline	App. 99
Appendix N	N.M.R.A. 17-316, Rules Governing Discipline	App. 101
Appendix O	Texas Rules Annotated; Internal Procedural Rules of the Board of Discipline Appeals, Rule 1.03	App. 105
Appendix P	Order Denying Request for Discovery of October 12, 2006	App. 106
Appendix Q	Objections of Disciplinary Counsel to Respondent's Second Request for Discovery served by Respondent herein, Petitioner below, on September 19, 2006	App. 109
Appendix R	Second Request for Discovery served by Petitioner, Respondent below, on September 13, 2006	App. 115
Appendix S	Order Denying Request for Discovery and Motion to Continue and Re-Set Final Hearing of August 4, 2006	App. 121

TABLE OF CONTENTS – Continued

		Page
Appendix T	Reply to Disciplinary Counsel's Memorandum in Opposition to Respondent's Request for Hearing, Discovery and to Continue served by Petitioner herein, Respondent below, on July 22, 2006	App. 123
Appendix U	Disciplinary Counsel's Memorandum in Opposition to Respondent's Request for Hearing on Pending Motions, Request for Discovery and Motion to Continue served by Respondent herein, Petitioner below, on July 14, 2006	App. 141
Appendix V	Request for Discovery served by Petitioner, Respondent below, on July 3, 2006	App. 148
Appendix W	Answer and Counterclaim to the Specification of Charges served by Petitioner, Respondent below, on July 3, 2006	App. 153

TABLE OF CONTENTS – Continued

Page

Appendix X — Order Denying Respondent's Alternative Motion to Dismiss Specification of Charges, Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and Setting Time for Filing of Answer and Respondent's Request for Hearing on Pending Motions of June 22, 2006 ..... App. 167

Appendix Y — Reply to Discipline Counsel's June 6, 2006 Memorandum in Response to Respondent's April 29, 2006 Motion to Dismiss served by Petitioner herein, Respondent below, on June 20, 2006 ..... App. 170

Appendix Z — Disciplinary Counsel's Memorandum in Response to Alternative Motions to Dismiss and Motion to Grant Alternative Motions to Dismiss served by Respondent herein, Petitioner below, on June 6, 2006 ..... App. 184

TABLE OF CONTENTS – Continued

		Page
Appendix AA	Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline, served by Petitioner herein, Respondent below, on April 29, 2006	App. 188
Appendix BB	Specification of Charges of February 22, 2007	App. 194
Appendix CC	Transcript of Hearing of December 19, 2007, pages 2-8, 19-20	App. 207
Appendix DD	Transcript of Hearing of July 30, 2007, pages 25 and 73	App. 219
Appendix EE	Transcript of Hearing of April 2, 2007, pages 16, 22 and 40	App. 222

TABLE OF AUTHORITIES

Page

CASES:

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 26, 27

Columbus Bar Association v. Dougherty, 99 Ohio St.3d 147, 789 N.E.2d 621 (Ohio 2003) 19

In the Matter of Conroy, 1 Cal.StateBarCt.Rptr. 86, 1990 WL 95660 19

Crawford-El v. Britton, 523 U.S. 574, 188 S.Ct. 1584, 140 L.Ed.2d 759 (1998) 11, 12

In the Matter of D'Angelo, 105 N.M. 391, 733 P.2d 360 (N.M. 1987), *cert. denied*, 479 U.S. 1065 (1987) 25

Delgado v. Costello, 91 N.M. 732, 580 P.2d 500 (Ct.App. 1978) 19

Garrison v. Louisiana, 397 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) 13, 14

Hartman v. Moore, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) 12

In re Philip Kleinsmith, 2005-NMCA-136, 238 N.M. 601, 124 P.3d 579 17

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1975) 14, 20, 22

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

Oklahoma Bar Association v. Eakin, 914 P.2d 644 (Okla. 1995) 19

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 11

Romero v. Sanchez, 83 N.M. 358, 492 P.2d 140 (1971) 19

In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 13, 18, 22, 25

State v. Cherryhomes, 114 N.M. 495, 840 P.2d 1261 (Ct.App. 1992) 17

Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct.App. 1973) 19

In the Matter of Stein, 2008-NMSC-013, 117 P.3d 513 ..... *passim*

Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) 11

Walker v. Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967) 17

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) 24, 25

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 26

Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) 13

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) 18

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment ..... *passim*

Fifth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

STATUTES:

Alien and Sedition Acts, 1 Stat. 566, 570, 596 12

28 U.S.C.A. § 1257 1

RULES:

CALIFORNIA:

Rules of State Bar of Calif., State Bar Court Rule 1201 23

Rules of State Bar of Calif., State Bar Court Rule 1202 23

FLORIDA:

F.S.A. Bar Rule 3-7.6 23

NEW MEXICO:

N.M.R.A.1-009(B) 19

N.M.R.A.1-026 *et seq.* 21

N.M.R.A.16-803.D 3, 21, 24

N.M.R.A.17-105.B 3, 20

TABLE OF AUTHORITIES – Continued

Page

N.M.R.A.17-301.B 4

N.M.R.A.17-306.A 4, 24

N.M.R.A.17-307.A 3, 20

N.M.R.A.17-309.A 4

N.M.R.A.17-311 (2006) 4

N.M.R.A.17-311 (2007) 5

N.M.R.A.17-313.A 5

N.M.R.A.17-314.A 9

N.M.R.A.17-314.B 9

N.M.R.A.17-316.A.(1) 9

TEXAS:

Board of Disciplinary Appeals;
Tx.R.Disc.A.Bd.Intl.P. Rule 1.03 23

CITATIONS FOR OPINION BELOW

The opinion of the Supreme Court of New Mexico (Appendix A) is reported as *In the Matter of Stein*, 2008-NMSC-013, 177 P.3d 513. The recommendation of the intermediate appeal to the Hearing Panel of Respondent Disciplinary Board (Appendix C) and the recommendation of the Hearing Committee appointed by Respondent Disciplinary Board (Appendix B) were not reported.

BASIS OF JURISDICTION OF COURT

28 U.S.C.A. § 1257 grants this Court jurisdiction to review on certiorari a judgment by the highest court of a state in which any right, privilege or immunity is claimed under the Constitution of the United States. The date of the Supreme Court of New Mexico opinion was February 20, 2008. There was no Motion for Rehearing filed directed to the opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Petitioner alleges that the Respondent violated his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

> ***The First Amendment:*** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> ***The Fifth Amendment:*** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.
>
> ***The Fourteenth Amendment, Section 1:*** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A complaint was made against Petitioner Stein by a state court judge to the New Mexico Office of Disciplinary Counsel. Investigations of complaints are conducted by disciplinary counsel. N.M.R.A.17-105.B and N.M.R.A.17-307.A. Appendix G and J. The Rules of Professional Conduct require that all lawyers cooperate with disciplinary counsel in their investigation:

> **D. Cooperation and Assistance; Required.** A lawyer shall give full cooperation and assistance to the highest court of the state and to the disciplinary board, hearing committees and disciplinary counsel in discharging their respective functions and duties with respect to discipline and disciplinary matters.

N.M.R.A.16-803.D, Rules of Professional Conduct. During investigation of a complaint disciplinary counsel has rights of discovery, including (a) service of interrogatories to the targeted lawyer, and (b) the issuance of subpoenas to witnesses or the targeted

attorney for documents and testimony. N.M.R.A.17-306.A. Appendix I. A targeted or respondent lawyer has no ability under the Rules Governing Discipline to initiate any discovery prior to the filing of formal charges. Charges are brought by the filing and service of a Specification of Charges. N.M.R.A.17-309.A. Appendix K.

A Specification of Charges was filed against Petitioner on February 22, 2007. Appendix BB. The Rules of Civil Procedure for the District Courts of New Mexico are used in formal disciplinary proceedings except where clearly inapplicable or inconsistent with the Rules Governing Discipline. N.M.R.A.17-301.B. Appendix H.

Once formal charges are filed, discovery, from that point forward, was controlled by the following rule:

> Upon a written showing of need, either party may apply to the chairman of the hearing committee for permission to conduct discovery proceedings prior to the date set for formal hearing.

N.M.R.A.17-311 (2006).[1] Within thirty (30) days after the time for filing an answer, a formal hearing on the

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[1] Effective January 15, 2007 the rule was changed to:

> A party may apply to the chair of the hearing committee for permission to conduct discovery prior to formal hearing. Upon a showing of good cause, the

(Continued on following page)

charges is set no later than one hundred and twenty (120) days from the date of the expiration of time for filing an answer. N.M.R.A.17-313.A. Appendix L.

In motion practice prior to the start of the hearing on the charges, Petitioner filed an Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline. Appendix AA. Disciplinary counsel opposed the motion. Disciplinary Counsel's Memorandum in Response, etc. Appendix Z. Petitioner's Reply noted that he did not know

> . . . what particular action is claimed to have violated what rule or rules of the Rules of Professional Conduct. The Due Process section of the Fifth and Fourteenth Amendments to the United States Constitution require the pairing of the act or acts and the violation of the rules.

Respondent's Reply, etc., Appendix Y, page 177. The Alternative Motion to Dismiss was denied. Order Denying, etc., Appendix X. No other Order was directed to this Due Process claim by the Hearing Committee. The Opinion of the Supreme Court of New Mexico notes the claims of Due Process violations

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chair may permit discovery upon such terms as may be appropriate under the circumstances.

N.M.R.A.17-311 (2007).

were raised by Petitioner. Appendix A, 2008-NMSC-013, ¶ 40, 117 P.3d 513 at 523.

In pleading practice prior to the hearing, Petitioner served his Answer and Counterclaim to the Specification of Charges on July 3, 2006. Appendix W.[2] Also on July 3, 2006 Petitioner served his first Request for Discovery. Appendix V. It requested the Chair to allow Petitioner to propound Requests to Produce, Requests for Admissions, Interrogatories and allow Depositions. *Id.* It was opposed. Disciplinary Counsel's Memorandum in Opposition to Respondent's Request for Hearing on Pending Motions, Request for Discovery and Motion to Continue. Appendix U. Petitioner served a Reply to Disciplinary Counsel's Memorandum in Opposition to Respondent's Request for Hearing, Discovery and to Continue on July 22, 2006. Appendix T.

> This hearing committee must keep in mind that all the pre-filing fact finding, interview of witnesses, accumulation of documentary evidence and other materials accomplished by disciplinary counsel was done without notice to Respondent. Admittedly, notice to Respondent is not required under the rules. This denies Respondent any right to object to such discovery. Yet, the Rules require the Respondent to request and show need for discovery once a Specification of Charges are

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[2] The Counterclaim was stricken.

> filed. Rule 17-311. This is inherently unfair and constitutionally infirm.
>
> * * *
>
> [T]his hearing committee must take notice that disciplinary counsel has all the discovery tools to obtain everything they need to prove their case at final hearing prior to filing a Specification of Charges.

Appendix T at pages 129-130. There is an

> . . . underlying unfairness that Petitioner [Office of Disciplinary Counsel] did all their discovery and were ready for the final hearing at the time they filed the Specification of Charges and seeks to deny Respondent [Petitioner] similar discovery after filing the charges . . .

Appendix T at page 133.

An Order was entered which denied the Request for Discovery. Appendix S.

During a break in the proceedings, Petitioner served a Second Request for Discovery again requesting the ability to propound requests to produce, request for admissions, interrogatories and depositions. Appendix R. Objections of Disciplinary Counsel to Respondent's Second Request for Discovery was served on September 19, 2006. Appendix Q. The second request for discovery was denied. Appendix P.

Disciplinary counsel requested no discovery from the Chair of the Hearing Committee after the filing of the Specification of Charges.

The hearing on the Specification of Charges took seven days from August, 2006 to January 2007. At conclusion of the proceedings, the Hearing Committee issued Findings of Fact and Conclusions of Law finding Petitioner violated certain provisions of New Mexico's Rules of Professional Conduct. The Hearing Committee then set a hearing to consider factors in mitigation or aggravation prior to recommending sanctions for the violations found.

At the hearing on mitigation and aggravation, disciplinary counsel, for the first time, raised and introduced copies of Petitioner's web/blog site as a factor in aggravation. Transcript, Appendix EE, page 223. No allegations were made that anything on the web/blog site was false or untrue. Objections to their introduction based on the First Amendment to the United States Constitution were raised and overruled. Appendix EE, page 225.

The Hearing Committee entered its Findings of Fact, Conclusions of Law and Recommendation for Discipline. It recommended a six-month suspension with automatic reinstatement to the Disciplinary Board. Appendix C.

An intermediate appeal was automatic to a three-member Hearing Panel of the Disciplinary Board.

N.M.R.A.17-314.A, Appendix M. Petitioner requested briefing and oral argument. N.M.R.A.17-314.B, Appendix M. At oral argument disciplinary counsel again raised the web/blog site before the Hearing Panel in an effort to increase the sanction from the six-month suspension to disbarment. Transcript, Appendix DD, page 220. Petitioner's objections were repeated. Appendix DD, pages 220-221. At this intermediate appeal, the Hearing Panel of the Disciplinary Board accepted disciplinary counsel's demand for Petitioner's disbarment and recommended same in its decision forwarded to the Supreme Court of New Mexico. Appendix B.

Petitioner requested a hearing before the Supreme Court of New Mexico under N.M.R.A.17-316.A.(1). Appendix N. The request was granted. The hearing was held on December 19, 2007 before the full panel of the Supreme Court of New Mexico. And, for a third time, Petitioner's web/blog site was raised at oral argument. Transcript, Appendix CC, pages 210; 213. Petitioner responds. *Id.* at pages 215-216. A small recess was taken after argument and, upon the court taking the bench, Petitioner was immediately disbarred. Transcript, Appendix CC, page 217.

The opinion of the Supreme Court of New Mexico on the disbarment of Petition was issued on February 20, 2008. *In the Matter of Stein*, 2008-NMSC-513, 117 P.3d 513, Appendix A. Content of the web/blog site was referenced as an aggravating factor. *Id., In the*

Matter of Stein, 2008-NMSC-513 ¶ 71; 117 P.3d 513 at 529.

This Petition for Writ of Certiorari followed.

REASONS FOR ALLOWANCE OF WRIT

This case presents questions concerning the New Mexico attorney discipline system procedures that violate the First Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. New Mexico attorney discipline procedures are similar to those in other states. The questions presented for review will have national impact.

Review is warranted to determine whether or how the exercise of core First Amendment criticism of an attorney discipline system on a web site or blog can be applied, if at all, for aggravating attorney discipline upon a finding of ethical violations.

Review is further warranted to determine implications of Due Process on the degree of specificity required to be given in a charging document; what amount of pre-hearing discovery, if any, is required to an accused attorney; and the required weight of the evidence to be used in finding a violation in this quasi-criminal proceeding.

I. REVIEW IS WARRANTED FOR FIRST AMENDMENT ISSUE.

This Court has recognized special protection when government seeks to extract punishment for exercise of core First Amendment rights. These protections are deeply embedded in American jurisprudence. After being entangled in what he believed an unconstitutionally applied attorney discipline system in New Mexico, Petitioner established a web site to voice criticism of the system and make suggestions for improvement. This political speech directed to the handling of attorney discipline by the New Mexico Supreme Court, its appointed board members and counsel – the third branch of government – is at the core of the First Amendment. *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

> Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford-El v. Britton*, 523 U.S. 574, 588, n. 10, 188 S.Ct. 1584, 140 L.Ed.2d 759 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592, 118 S.Ct. 1584; see also *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech").

Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695, 1701, 164 L.Ed.2d 441 (2006).

The Supreme Court of New Mexico used evidence of the web site, an exercise of Petitioner's First Amendment rights introduced over objection at the Hearing Committee, as a factor in aggravation to raise the punishment sanction in a professional discipline case to disbarment. Appendix A, 2008-NMSC-013, ¶ 71, 177 P.3d at 529. This was constitutional error. *Hartman v. Moore*, 547 U.S. 250 (2006) and *Crawford-El v. Britton*, 523 U.S. 574 (1998). To hold, without allowing notice or hearing on the content, that the web site of Petitioner " . . . expressed disdain and contempt for the disciplinary board . . . " as a basis for disbarment is, on its face, a *Hartman* violation requiring review and reversal. Appendix A, 2008-NMSC-013, ¶ 71, 177 P.3d at 529. If there was a prohibition by statute or rule against out-of-court expression of "disdain and contempt" for a government official, judicial or otherwise, it would be quickly set aside as unconstitutional; akin to the Alien and Sedition Acts. 1 Stat. 566, 570, 596; *New York Times Co. v. Sullivan*, 376 U.S. 254 at 274, 84 S.Ct. 710 at 723, 11 L.Ed.2d 686 (1964).

"Only those false statements made with the high degree of awareness of their probable falsity demanded by [*New York Times Co. v . Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] may be the subject of either civil or criminal sanctions. . . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is

concerned." *Garrison v. Louisiana*, 397 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Without subjecting the content of Petitioner's web site to the criteria outlined in *New York Times Co. v. Sullivan* at an evidentiary hearing and using the site which expresses opinion on the New Mexico attorney disciplinary system as a factor in aggravation violates Petitioner's First Amendment rights and constitutes an issue requiring review.

II. REVIEW IS WARRANTED FOR DUE PROCESS ISSUES.

Disbarment destroys a lawyer's reputation and means of livelihood, both recognized liberty interests. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). It is firmly established that an attorney is entitled to procedural Due Process in disciplinary proceedings. *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). However, what minimal process is due in attorney discipline proceedings has not been established. This determination is subject to a three-part balancing analysis:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

> procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1975). Each of these factors was ignored in the New Mexico administrative process that resulted in Petitioner's disbarment in an unconstitutional violation of his Due Process rights.

Review by this Court is necessary to address procedures used in attorney discipline matters for the introduction of attorney web sites as aggravation of punishment; requirements for specificity in charging documents; discovery and level of proofs required to adequately pass Due Process muster under the First, Fifth, and Fourteenth Amendments.

A. First Amendment Hearing.

Before any admission of core political speech as an aggravating factor against an attorney who is the subject of a professional discipline proceeding, Due Process requires an evidentiary hearing with adequate notice, production of the materials sought to be introduced with a burden on disciplinary counsel to meet the criteria outlined in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Garrison v. Louisiana*, 397 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) before the materials can be introduced in evidence. This was not done. It

was a Due Process violation requiring review and reversal by this Court.

B. Specificity of Charges – Violation of Court Order.

The case was based on a complaint letter to the Disciplinary Board by a state District Court judge who was assigned the guardianship and conservatorship case over Petitioner's client: the proposed ward in the case, Bruce Clinesmith. Petitioner made an appearance representing Mr. Clinesmith and his wife Ruth Clinesmith. The complaint was investigated by disciplinary counsel who prepared his entire case before filing any charges. He was able to do so under the authority and powers granted by the New Mexico Rules Governing Discipline and the compelled cooperation of lawyers under the New Mexico Rules of Professional Conduct.

A Specification of Charges was filed. Appendix BB. This charging document connected no actions, failure of actions, duties or failure of duties of Petitioner to specific violations of the New Mexico Rules of Professional Conduct. A Motion to Dismiss was filed. Appendix AA. It was denied. Appendix X. Discovery was requested. Appendix V. It was denied. Appendix S.[3]

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[3] The Opinion found that Petitioner " . . . received the entire disciplinary board file prior to the hearing." Appendix A, 2008-NMSC-013, ¶ 57, 117 P.3d at 526. The finding is incorrect. First, the Opinion omits the fact that the materials – filling three,

(Continued on following page)

Petitioner was never charged with or held in contempt of court by the judge who initiated the complaint letter or any judge involved in the matters in which Petitioner represented the Clinesmiths. Nothing in the Specification of Charges specifically claimed that Petitioner violated any court orders. Yet, it was upon a claimed violation of a court order argued by disciplinary counsel that was accepted by the Hearing Committee and the Supreme Court of New Mexico as basis for disbarment. Appendix A, 2008-NMSC-013 ¶ 63, 117 P.3d at 517.[4]

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three-inch binders – were delivered less than **two working days** before the hearing began because of a subpoena Petitioner was able to get issued. However, the subpoena *duces tecum,* which would have also supplied testimony to identify what was supplied and if it was complete, was subsequently quashed on the first day of the hearing on a motion presented by the New Mexico Attorney General on behalf of the Disciplinary Board. Second, the finding in the Opinion that it was the entire file is in error. On the third day of hearing other materials not previously supplied were ordered by the Hearing Committee to be subsequently delivered to Petitioner. There is nothing in the record to support the statement that Petitioner was ever supplied the entire disciplinary board file.

[4] The Specification of Charges contained no quote from any court order that was claimed to be violated by Respondent. Appendix BB. The Opinion, however, twice identifies and quotes two sentences from one district court order that Petitioner allegedly violated. Appendix A, 2008-NMSC-013 ¶¶ 10 and 63, 117 P.3d at 517 and 528. Specificity in writing of a violation of a portion of a court order was articulated by the Opinion only after the case was completed. Disciplinary counsel claimed that Petitioner failed to follow a court order at the hearing, but such charge was not contained in the Specification of Charges.

The theory of collateral estoppel was abandoned on the record by disciplinary counsel. Appendix A, 2008-NMSC-013, ¶¶ 52, 53, 117 P.3d 513 at 525, 526. Although not identified by name, the theory of "collateral bar" was wrongfully claimed as the basis of violation of the court order by disciplinary counsel and echoed in the Opinion. *Id.* (*In re Philip Kleinsmith,* 2005-NMCA-136, ¶ 11, 238 N.M. 601, 124 P.3d 579 ("citing *State v. Cherryhomes*, 114 N.M. 495, 498, 840 P.2d 1261, 1264 (Ct.App. 1992))"). Both cases discuss the "collateral bar" theory. The *sine qua non* for use of "collateral bar" is a finding of contempt in the lower court. The Opinion, in citing *Kleinsmith,* correctly quotes the language but ignores the contempt requirement for "collateral bar" to apply. *Id. See, Walker v. Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). The Opinion affirms disciplinary counsel's power to administratively punish an attorney with disbarment under the collateral bar theory for violating a court order without a finding of contempt by a court.

Petitioner was never put on notice before the proceedings began that he was on trial for violation of court orders.[5] "The charge must be known before the

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[5] The Chair of the Hearing Committee agreed on the record that there was no charge of violating a court order in the Specification of Charges, but lack of a written charge did not stop that ultimate finding in the Opinion and disbarment. Petitioner twice subpoenaed the complaining trial judge to testify at the hearing. She could have explained why Petitioner was not held in contempt if he violated any order she issued.

(Continued on following page)

proceedings commence." *In Re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968). *See also, Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 654, 105 S.Ct. 626, 654, 85 L.Ed.2d 652 (1985) ("[W]hat is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio."). The charges changed after the hearing began.

Not identifying with particularity that Petitioner was to be tried for failure to follow a court order in the Specification of Charges was a Due Process violation. Prior to trial if such a charge was leveled in the Specification of Charges and "collateral bar" identified as the theory upon which the prosecution relied, a short Motion for Summary Judgment on the issue would have been dispositive. The non-existence of any finding of contempt defeats the charge that Petitioner violated an order under any theory, including collateral bar.

C. Specificity of Charges – Fraud and Misrepresentation.

Petitioner raised in his Motion to Dismiss that the Specification of Charges did not articulate with adequate particularity what actions or failure of actions corresponded to each specifically charged

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Both subpoenas were quashed by the Chair of the Hearing Committee.

violation of the Rules of Professional Conduct to place him on notice to prepare his defense, including claims of fraud and misrepresentation. Appendix AA. The Motion to Dismiss was denied. Appendix X.

The Opinion refuses to apply N.M.R.A.1-009(B) requiring specificity when alleging fraud in attorney disciplinary proceedings. Appendix A, 2008-NMSC-013, ¶ 46, 117 P.3d at 524. Attorney disciplinary proceedings in other states require such specificity. *See, Columbus Bar Association v. Dougherty*, 99 Ohio St.3d 147, 149, 789 N.E.2d 621 (Ohio 2003); *Oklahoma Bar Association v. Eakin*, 914 P.2d 644, 649 (Okla. 1995) (citing federal Due Process) and *In the Matter of Conroy*, 1 Cal.StateBarCt.Rptr. 86 at page 5, 1990 WL 95660.

To support the conclusion that the filed Specification of Charges was adequate notice of fraud or misrepresentation for Petitioner, the Opinion cites three civil cases: *Steadman v. Turner*, 84 N.M. 738, 740, 507 P.2d 799, 801 (Ct.App. 1973); *Romero v. Sanchez*, 83 N.M. 358, 359, 492 P.2d 140, 141 (1971) and *Delgado v. Costello*, 91 N.M. 732, 734, 580 P.2d 500, 502 (Ct.App. 1978). Appendix A, 2008-NMSC-013, ¶ 46, 117 P.3d at 524. Each cited case, however, was decided on motions to dismiss or summary judgment, were reversed and sent back to the trial court for further action. "Further action" allowed full discovery under the New Mexico Rules of Civil Procedure when it went back to District Court. No defendant in these cited civil cases needed permission to conduct discovery; it would be their right under the rules.

Under the Rules Governing Discipline, Petitioner had to request permission to conduct discovery – interrogatories, depositions, requests to produce, requests for admissions. N.M.R.A.17-311, *infra* at page 4, *see* Appendix V. Permission was denied. Appendix S. Petitioner requested permission to conduct discovery a second time. Appendix R. Permission, again, was denied. Appendix P.

Petitioner located no case holding that Due Process is satisfied to defend a fraud or misrepresentation claim, no matter how articulately described in a civil or quasi-criminal matter, when there is denial of all pre-trial discovery. The issue is an obvious and self-evident Due Process violation and ripe for review by this Court.

D. Due Process Discovery; *Mathews v. Eldridge* Balancing.

Respondent Disciplinary Board, through its counsel, was required to and did investigate the complaint against Petitioner prior to the filing of a Specification of Charges. N.M.R.A.17-105.B, Appendix G and N.M.R.A.17-307.A, Appendix J. In this pre-filing period disciplinary counsel obtained discovery consisting of confidential court records including pleadings, orders and transcripts.

Discipline counsel obtained help in his investigation from the judge who initially made the complaint against Petitioner and other attorneys who were involved in the matter. In addition to the court

items, noted above, there was further help in the form of letters and conversations with those persons. Lawyer members of the State Bar of New Mexico are required to give "full cooperation and assistance" to discipline counsel in their duties under the Rules of Discipline. N.M.R.A.16-803.D, *infra*, page 3.

In a New Mexico civil setting, discovery is allowed as a matter of right, without leave of court or tribunal. N.M.R.A.1-026 *et seq*. Without discovery and clearly outlined violations in the Specification of Charges, Petitioner went to trial without knowing his transgressions and only finding out the case and theories of the state as the hearing continued and after it concluded.

The impact of the lack of Due Process discovery became devastatingly evident with the issuance of the disbarment opinion of the Supreme Court of New Mexico. It articulated facts, duties and obligations not pled with any particularity in the Specification of Charges or mentioned in the holdings of the Hearing Committee or Hearing Panel. *Compare, e.g.*, Appendix A, Opinion ¶ 36, 39 with Appendix BB, Specification of Charges, Appendix C, Hearing Committee's Findings of Fact and Conclusions of Law and Recommendation for Discipline, Appendix B, Decision of Hearing Panel.

Failure to have adequate Due Process notice of the actual charges, facts, duties and obligations articulated in the Opinion perhaps could have been cured with discovery, but all pre-hearing discovery

was denied. Regardless, this Court has held that in attorney disciplinary proceedings, "The charge must be known before the proceedings commence." *In Re Ruffalo*, 390 U.S. 544, 551. The wrongs upon which the Opinion rested its disbarment conclusions were not contained in the Specification of Charges.

Application of the Due Process balancing test results in a significant tilt toward a requirement of greater Due Process protections for Petitioner than was provided by New Mexico. *Mathews v. Eldridge*, 414 U.S. 319 at 335 (1975). An attorney's private interest in keeping his license to practice law and his reputation in the community is of first magnitude. It is not for money damages. After the devastation of disbarment, for the rest of his or her life, the name of that attorney will always be modified with the disreputable tag of "a disbarred lawyer," the professional mark of Cain.

Due Process protection from the impact of an erroneous deprivation could have been met by the allowance of adequate discovery tools available to any litigant facing a money judgment on a civil claim.

"It is the obligation of the organized bar and the individual lawyer to give unstinted cooperation and assistance to the Supreme Court . . . in purging the profession of the unworthy." Opinion, Appendix A, 2008-NMSC-013, ¶ 71, 177 P.3d at 529. Likewise, it is the state's obligation under the Due Process requirements of the Fifth and Fourteenth Amendments to have in place adequate procedural safeguards to be

sure that lawyers who are ***not*** unworthy but wrongfully charged don't have their hands tied in defending themselves from being wrongfully purged from the roll of admitted attorneys.

Allowing full discovery under the Rules of Civil Procedure would assure Due Process procedures to protect against erroneous deprivation of disbarment. Other states have seen fit to allow comprehensive discovery; some equal to the Rules of Civil Procedure, others coming quite close. *See, e.g.,* Florida, F.S.A. Bar Rule 3-7.6(f)(2) (incorporating discovery rules in accordance with the Florida Rules of Civil Procedure) Appendix F; Texas, Board of Disciplinary Appeals; Tx.R.Disc.A.Bd.Intl.P. Rule 1.03 (incorporating Texas Rules of Civil Procedure as applicable), Appendix O; and California, Rules of State Bar of Calif., State Bar Court Rules 1201 and 1202 (allowing discovery), Appendix D and E.

The fiscal and administrative burden to grant discovery to an attorney respondent in a disciplinary matter is minimal. Any attempted abuse of the discovery system is subject to motions for protective orders and sanctions well known on the civil side of New Mexico and all state and federal courts.

An alternative to a requirement of the full pallet of discovery under the Rules of Civil Procedure is putting the state and the accused attorney on equal footing to meet minimal Due Process requirements. This Court has noted that although

> . . . the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser . . . FN6
>
> > FN6. This court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial.
> >
> > * * *
>
> But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street.

Wardius v. Oregon, 412 U.S. 470, 474-475, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973). Although *Wardius* was a criminal case, there is nothing in reason or logic why the Due Process balancing in a quasi-criminal case of attorney discipline concerning discovery should not also be a constitutionally mandated two-way street. The state is the prosecutor in both.

Under the New Mexico Rules Governing Discipline, the state through its disciplinary counsel has the right to take depositions, propound interrogatories, obtain the production of documents. N.M.R.A. 17-306.A. Appendix I. Lawyers are required to cooperate with disciplinary counsel. N.M.R.A. 16-803.D, *infra*, page 3. Without allowing accused attorneys in a disciplinary process to have the same discovery tools as disciplinary counsel, the Due Process Clause is violated.

Attorneys charged in discipline proceedings should have at least the same discovery tools allowed to their prosecutor as a matter of Due Process under the Fifth and Fourteenth Amendments.

E. Clear and Convincing Evidence Is Required in Quasi-Criminal Proceedings.

In New Mexico, absent an allegation of fraud, attorney discipline matters are proved by a preponderance of the evidence. *In the Matter of D'Angelo*, 105 N.M. 391, 733 P.2d 360 (N.M. 1987), *cert. denied*, 479 U.S. 1065 (1987). The challenge in *D'Angelo* was limited to the question of the burden of proof. *D'Angelo*, 105 N.M. at 392, 733 P.2d at 361. D'Angelo claimed that the proofs did not meet the clear and convincing standard while the Disciplinary Board claimed it did meet that higher standard of proof. *Id.* The New Mexico Supreme Court agreed, but used the case to change the standard to a "preponderance of the evidence." *Id.* There was no claim in *D'Angelo* of lack of parallel or unequal ability of discovery between the prosecution and the accused. *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). Nor was there a claim in *D'Angelo* that ethical charges faced in the case were changed after the hearing began. *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

This Court has recognized that an attorney disciplinary hearing is a quasi-criminal proceeding for which Due Process protections are required. *In Re*

Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968). Concerning the nexus between the Due Process Clause and the required standards of proof, this Court has written:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979), citing *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring.).

"Quasi-criminal" is a description of the nature of the case before the tribunal. This Court has determined that the burden of proof for quasi-criminal matters is the intermediate evidentiary standard, sometimes called "clear and convincing" evidence. *Addington*, 418 U.S. at 424, 99 S.Ct. at 1808, 60 L.Ed.2d 323 (1979).

> One typical use of the standard is in civil cases involving allegations of fraud or some other ***quasi-criminal*** wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished

> erroneously by increasing the plaintiff's burden of proof.

Id., emphasis supplied.

Review by this Court is necessary to make clear that attorney discipline proceedings are quasi-criminal in nature and, as such, the Due Process Clause requires that the burden of proof required for violation of ethical rules must be the intermediate standard of proof. That burden would be in between the criminal standard of "beyond a reasonable doubt" and the typical civil standard of "preponderance of the evidence," be it called "clear and convincing" or some other term.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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TABLE OF APPENDICES

		Page
Appendix A	Opinion of Supreme Court of New Mexico entered on February 20, 2008. *In the Matter of Stein,* 2008-NMSC-013, 117 P.3d 513	App. 1
Appendix B	Decision of the Hearing Panel of August 7, 2007	App. 43
Appendix C	Hearing Committee's Findings of Fact and Conclusions of Law and Recommendation for Discipline of April 4, 2007	App. 49
Appendix D	California Rules of Practice of State Bar Court, Rule 1201	App. 61
Appendix E	California Rules of Practice of State Bar Court, Rule 1202	App. 62
Appendix F	Rules Regulating The Florida Bar Rule 3-7.6	App. 64
Appendix G	N.M.R.A. 17-105, Rules Governing Discipline	App. 75
Appendix H	N.M.R.A. 17-301, Rules Governing Discipline	App. 79
Appendix I	N.M.R.A. 17-306, Rules Governing Discipline	App. 81
Appendix J	N.M.R.A. 17-307, Rules Governing Discipline	App. 87

TABLE OF APPENDICES – Continued

		Page
Appendix K	N.M.R.A. 17-309, Rules Governing Discipline	App. 91
Appendix L	N.M.R.A. 17-313, Rules Governing Discipline	App. 95
Appendix M	N.M.R.A. 17-314, Rules Governing Discipline	App. 99
Appendix N	N.M.R.A. 17-316, Rules Governing Discipline	App. 101
Appendix O	Texas Rules Annotated; Internal Procedural Rules of the Board of Discipline Appeals, Rule 1.03	App. 105
Appendix P	Order Denying Request for Discovery of October 12, 2006	App. 106
Appendix Q	Objections of Disciplinary Counsel to Respondent's Second Request for Discovery served by Respondent herein, Petitioner below, on September 19, 2006	App. 109
Appendix R	Second Request for Discovery served by Petitioner, Respondent below, on September 13, 2006	App. 115
Appendix S	Order Denying Request for Discovery and Motion to Continue and Re-Set Final Hearing of August 4, 2006	App. 121

TABLE OF APPENDICES – Continued

		Page
Appendix T	Reply to Disciplinary Counsel's Memorandum in Opposition to Respondent's Request for Hearing, Discovery and to Continue served by Petitioner herein, Respondent below, on July 22, 2006	App. 123
Appendix U	Disciplinary Counsel's Memorandum in Opposition to Respondent's Request for Hearing on Pending Motions, Request for Discovery and Motion to Continue served by Respondent herein, Petitioner below, on July 14, 2006	App. 141
Appendix V	Request for Discovery served by Petitioner, Respondent below, on July 3, 2006	App. 148
Appendix W	Answer and Counterclaim to the Specification of Charges served by Petitioner, Respondent below, on July 3, 2006	App. 153

TABLE OF APPENDICES – Continued

		Page
Appendix X	Order Denying Respondent's Alternative Motion to Dismiss Specification of Charges, Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and Setting Time for Filing of Answer and Respondent's Request for Hearing on Pending Motions of June 22, 2006	App. 167
Appendix Y	Reply to Discipline Counsel's June 6, 2006 Memorandum in Response to Respondent's April 29, 2006 Motion to Dismiss served by Petitioner herein, Respondent below, on June 20, 2006	App. 170
Appendix Z	Disciplinary Counsel's Memorandum in Response to Alternative Motions to Dismiss and Motion to Grant Alternative Motions to Dismiss served by Respondent herein, Petitioner below, on June 6, 2006	App. 184

TABLE OF APPENDICES – Continued

		Page
Appendix AA	Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline, served by Petitioner herein, Respondent below, on April 29, 2006	App. 188
Appendix BB	Specification of Charges of February 22, 2007	App. 194
Appendix CC	Transcript of Hearing of December 19, 2007, pages 2-8, 19-20	App. 207
Appendix DD	Transcript of Hearing of July 30, 2007, pages 25 and 73	App. 219
Appendix EE	Transcript of Hearing of April 2, 2007, pages 16, 22 and 40	App. 222

APPENDIX A

177 P.3d 513

Supreme Court of New Mexico.
In the MATTER of Stuart L. STEIN, Esquire.
An Attorney Licensed to Practice Before the Courts of the State of New Mexico, No. 02-2006-505.
No. 17,349.

Feb. 20, 2008.

Joel L. Widman, Disciplinary Counsel, Albuquerque, NM, for Petitioner.

The Stuart Law Firm, Stuart L. Stein, Albuquerque, NM, for Respondent.

OPINION

PER CURIAM.

{1} This matter came before the Court to consider whether attorney Stuart L. Stein (Respondent) should be disbarred for violating the Rules of Professional Conduct through his actions associated with his representation of Bruce Clinesmith and his wife, Ruth Clinesmith. For the reasons that follow, we adopt the findings and conclusions of the hearing committee and adopt the recommendation of the disciplinary board to disbar Respondent from the practice of law.

I. BACKGROUND

{2} These disciplinary proceedings commenced with a letter sent by the Honorable Linda M. Vanzi of the Second Judicial District Court, setting forth a complaint regarding Respondent's conduct in a proceeding seeking the appointment of a guardian and conservator for Bruce Clinesmith. The petition for appointment of a guardian and conservator was filed by Bruce's daughter, Cathe Temmerman, because of concerns about her father's emotional and financial well-being.

{3} Respondent appeared on behalf of Bruce and Ruth, and other members of Ruth's family who purported to have an interest in the matter. Respondent filed an answer to the petition requesting that Ruth be appointed as guardian for Bruce, if in fact the court determined a guardian should be appointed. The answer further alleged the existence of a durable power of attorney executed by Bruce in favor of his wife and stated that the court should not disregard Bruce's clear intent, presumably as evidenced by the power of attorney. Upon the filing of the petition, the court appointed Richard Reidy as guardian *ad litem* for Bruce.

{4} At the time of the filing of the petition in the guardianship case, there were two trusts in existence that were created by Bruce. One was a 1997 revocable trust (the 1997 trust), which provided for the income and principal to be paid to Bruce as needed, with the remainder payable upon his death to the Moody Bible

Institute of Chicago (Moody Bible). The corpus of this trust was $6,275,000.00. The second was a 1999 revocable trust (the 1999 trust), the income and principal of which were to be paid to Bruce. Upon his death, the remainder was to be held in trust for his wife. Upon Ruth's death, the remainder was to be paid to Moody Bible. The corpus of this trust was $4,800,000.00.

{5} On the same date that Respondent filed his answer to the guardianship and conservatorship petition, Respondent wrote to the trustee, demanding that the income and corpus of the 1997 Trust and the 1999 Trust be paid to Ruth, individually. When the trustee refused the request, Respondent filed two lawsuits in the United States District Court for the District of New Mexico, which the hearing committee found would affect the manner in which Bruce's estate would be managed, expended, and distributed. Respondent took these actions notwithstanding his knowledge of the pendency of the guardianship and conservatorship proceeding and without notice to Bruce's guardian *ad litem*.

{6} Respondent, as Bruce's and Ruth's attorney, filed the first federal lawsuit to void the trusts created by Bruce in favor of Moody Bible, and to have the funds declared community property. The Moody Bible lawsuit was filed on Ruth's behalf, individually, and purportedly on Bruce's behalf, "by Ruth M. Cline-smith, his attorney-in-fact," pursuant to the durable power of attorney.

{7} Respondent filed the second federal lawsuit against Citigroup Global Markets, Inc., on behalf of Ruth in her individual capacity, alleging the existence of a joint account in the names of Bruce and Ruth that was restricted by Citigroup without authority. Citigroup had placed a freeze on the account because of its concerns that Bruce's mental health had deteriorated and because of its uncertainty that he fully comprehended his actions. In the Citigroup lawsuit, Ruth sought damages, or in the alternative, full access to the account. However, once again, Respondent did not notify Bruce's guardian *ad litem* of the filing of this lawsuit.

{8} Significantly, neither lawsuit named Bruce as a plaintiff individually. Also, the two complaints filed by Respondent acknowledge Bruce's potential incapacity. The complaint prepared and filed by Respondent in the Moody Bible lawsuit alleges that in August 2004, when Bruce and Ruth relocated to Albuquerque, Bruce was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis." In the Citigroup complaint, Respondent states "[t]hat there is a current question about the competence of Bruce C. Clinesmith."

{9} Although the Citigroup complaint requested Ruth's full access to the account as co-tenant with Bruce, Respondent negotiated a settlement which transferred the account to another broker, exclusively under Ruth's name, thus effectively precluding Bruce from accessing the account. During the negotiations Respondent produced a copy of the power of attorney

executed by Bruce in his wife's favor. The settlement was confirmed in letters sent by Respondent to Citigroup's associate general counsel. This conduct by Respondent resulted in the removal of assets in excess of $250,000.00 from the state district court's jurisdiction in the guardianship and conservatorship proceeding without notice to, or leave of, that court.

{10} During a subsequent hearing Judge Vanzi considered a motion to disqualify Respondent from representing Bruce because of a conflict between his interests and those of Ruth. Of note, during the hearing, was Respondent's statement that "I agree that [Bruce] is incapacitated to the extent that he may need a guardian or conservator." Thereafter, the court disqualified Respondent from representing Bruce, revoked the power of attorney previously granted to Ruth by Bruce, and appointed Decades LLC temporary guardian and conservator of Bruce. The court set forth the following rationale for disqualifying Respondent from representing Bruce.

> The interests of Bruce C. Clinesmith and Ruth M. Clinesmith are adverse to each other in this proceeding and in the federal proceedings currently pending. Representing both individuals in these proceedings constitutes an impermissible conflict of interest and neither Stuart L. Stein, Esq. or The Stein Law Firm can continue to represent the interests of Bruce C. Clinesmith.

The court also ordered the court clerk to "issue letters of full temporary guardianship and temporary

conservatorship to Decades LLC upon accepting its duties hereunder" and "in connection with its duties as temporary guardian and temporary conservator, Decades LLC shall consult with the Guardian Ad Litem and promptly retain counsel to represent Mr. Clinesmith's interests in the federal proceedings. . . . " Pursuant to this order, the attorney for Decades LLC sent a letter to Respondent advising him that Decades LLC, in its capacity as Bruce's temporary guardian and conservator, considered Respondent's representation of Bruce to be terminated effective July 18, 2005, and stated that the termination applied to all matters, including the guardianship and conservatorship case, the Moody Bible lawsuit, and the Citigroup lawsuit.

{11} Respondent never advised the federal court in which the Moody Bible lawsuit was pending that he had been disqualified from representing Bruce, that the power of attorney had been revoked, or that a temporary guardian and conservator had been appointed for Bruce. Respondent continued to represent Bruce in the Moody Bible lawsuit after he was disqualified from doing so, by remaining attorney of record and filing a motion to vacate a scheduling order. In addition, at no time did Respondent advise Citigroup, to whom he negotiated a transfer of funds from Bruce to Ruth, that the power of attorney he previously produced had been revoked.

{12} After being ordered to discontinue his representation of Bruce, Respondent went to the dementia unit of the Woodmark, a residential care facility in

which Bruce was a patient, and had Bruce removed from the dementia unit and taken to a private room to execute a new will and trust which Respondent had prepared for Bruce's signature. The new will and trust sought to revoke the Moody Bible trusts and create a new trust with Ruth as trustee with all the power "that an absolute owner of such property would have." These documents had the additional effect of removing all of the assets belonging to Bruce from the jurisdiction of the court in the guardianship and conservatorship proceeding. Respondent did not notify the court, the guardian *ad litem,* or the temporary guardian and conservator of his intended visit with Bruce, or of his efforts to have Bruce sign a new will and trust.

{13} Upon learning of the meeting and execution of the will and trust, Decades LLC filed a motion asking for an emergency hearing and seeking an order prohibiting Respondent from interfering with its duties as temporary guardian and conservator and preventing Respondent from having any contact with Bruce. The court held a hearing on the motion and Respondent admitted going to the Woodmark without notifying Decades LLC. Remarkably, he told the court that he "didn't have to" because it was not explicitly stated in the order. Respondent also admitted that he did not notify the guardian *ad litem.* When asked if it was his practice to approach incapacitated persons without notifying the court-appointed guardian/conservator or any other person caring for the individual, Respondent stated, "[i]n this case this is what

I did and I feel that it is fine. It is ethical, and not in contravention of your order. . . ." Thereafter, the court entered an order enjoining Respondent from having any contact with Bruce and voiding the will and trust executed by Bruce. The order states specifically that "Stuart L. Stein, Esq., The Stein Law Firm, and all members or staff of the Stein Law Firm are hereby enjoined from having contact with Bruce C. Clinesmith in any way, shape or form. . . ."

{14} Shortly thereafter, the court disqualified Respondent from any continued representation of Ruth. The court found that "Mrs. Clinesmith's interests, and those of her family, are materially adverse to the interests of Mr. Stein's former client, Bruce Clinesmith" and that "[i]nformation relating to the representation of Mr. Clinesmith by Mr. Stein is being used to Mr. Clinesmith's disadvantage and to the advantage of Mrs. Clinesmith." Despite being disqualified from representing Ruth in state court, Respondent never advised the federal court in which the Moody Bible lawsuit was pending of his disqualification. In fact, Respondent continued to represent Ruth by filing a motion to vacate an initial scheduling order both on her behalf and on behalf of Bruce under Ruth's durable power of attorney. The federal court, however, disqualified Respondent from representing any party in the Moody Bible lawsuit for the same reasons he was disqualified by Judge Vanzi in the guardianship and conservatorship proceeding.

{15} By reason of the foregoing conduct, a specification of charges was filed by deputy disciplinary

counsel pursuant to Rule 17-105(B)(3)(d) NMRA. The specification of charges detailed the conduct summarized above and alleged that such conduct violated many of the Rules of Professional Conduct. *See* Rules 16-107(A) and (B), 16-109(A), 16-804(C), (D), and (H), 16-102(D), and 16-402 NMRA.

{16} Respondent's conduct in both the Moody Bible and the Citigroup lawsuits resulted in the hearing committee, after a full hearing, to conclude that Respondent had violated the following Rules of Professional Conduct: (1) Rule 16-107(A) by representing Ruth, whose interests were adverse to those of another client (Bruce); (2) Rule 16-107(B), in that Respondent represented a client (Bruce) where the representation of that client was materially limited by his representation of another client (Ruth); and (3) Rule 16-109(A) by his conduct in the Moody Bible lawsuit, in that Respondent represented a client (Ruth) in the same or a substantially related matter in which that person's interests were materially adverse to those of a former client (Bruce) and without the consent of the former client.

{17} Based upon Respondent's conduct in the Moody Bible lawsuit, the Citigroup lawsuit, and his actions at the Woodmark, the hearing committee found violations of Rule 16-804(C), in that Respondent engaged in conduct involving misrepresentation by neglecting to notify the courts and interested parties of the pending litigations, of the occurrences in the guardianship and conservatorship proceeding, and of his visit to Bruce and execution of a new will and

trust. The hearing committee also found that Respondent's conduct in the aggregate violated Rule 16-804(D), in that he engaged in conduct prejudicial to the administration of justice, and Rule 16-804(H), in that he engaged in conduct adversely reflecting on his fitness to practice law. Because of Respondent's conduct in the Moody Bible lawsuit, the hearing committee also found that Respondent violated Rule 16-102(D) by assisting his client Ruth to engage in conduct he knew was misleading to the federal court.

{18} Finally, the hearing committee found that by Respondent's actions in relation to the Woodmark visit, he violated Rule 16-402, by communicating directly with Bruce about executing a new will and trust without the consent of Bruce's newly-appointed lawyer.

{19} The hearing committee recommended that Respondent be suspended from the practice of law for a period of six months with automatic reinstatement and that he pay costs. The findings and conclusions of the hearing committee were forwarded to the disciplinary board hearing panel for review. *See* Rule 17-314(A) NMRA (stating that the chair of the disciplinary board shall appoint a hearing panel upon receipt of the hearing committee's findings of fact, conclusions and recommendations). In its order and decision, the hearing panel accepted and adopted the committee's findings and conclusions. The hearing panel found that Respondent "basically agreed with each Finding of Fact of the Hearing Committee with

his limited objections being either stylistic or immaterial to the conclusions." However, the panel rejected the hearing committee's recommended discipline, and instead recommended to this Court that Respondent be disbarred from the practice of law for no less than five years and that he pay costs.

II. DISCUSSION

[20] Respondent argues that there was a "complete failure of proof at the hearing committee level to prove any of the charges in the Specification of Charges." He specifically argues that there was no proof of any conflict of interest or misrepresentations created by representing both Bruce and Ruth in the guardianship and conservatorship case before Judge Vanzi and by his actions in the two federal cases. For the reasons that follow, we hold that there is substantial evidence to support the hearing committee's findings, and that those findings support the committee's conclusions that Respondent violated the conflict of interest and misrepresentation provisions of the Rules of Professional Conduct. We also hold that there is substantial evidence to support the committee's remaining findings, and that those findings support the remaining conclusions.

A. Standard of Review

[21] The findings of the hearing committee are reviewed for substantial evidence and the conclusions of law are reviewed de novo. *See In re Bristol*,

2006-NMSC-041, ¶¶ 16-18, 140 N.M. 317, 142 P.3d 905 (per curiam); *In re Estrada,* 2006-NMSC-047, ¶ 7, 140 N.M. 492, 143 P.3d 731 (per curiam). Both the hearing panel and this Court look to see whether substantial evidence exists to support the hearing committee's decision. *See In re Bristol,* 2006-NMSC-041, ¶ 16, 140 N.M. 317, 142 P.3d 905.

B. Conflict of Interest

{22} Under the New Mexico Rules of Professional Conduct, an attorney "should not represent a client whose interests are adverse to those of a present client, or whose interests are adverse to those of a former client on a matter that is the same or substantially related to the previous matter." *United States v. Gallegos,* 39 F.3d 276, 279 (10th Cir.1994) (summarizing New Mexico's disciplinary rules regarding conflict of interest); *accord* Rule 16-107(A) and (B). An objective standard is used when determining whether the lawyer reasonably could believe that the representation of a client with interests adverse to those of another client would not adversely affect the lawyer's relationship with the other client. *See In re Houston,* 1999-NMSC-032, ¶ 12, 127 N.M. 582, 985 P.2d 752. As such, Respondent's subjective belief that no conflicts existed is irrelevant. Viewed objectively, the facts speak for themselves.

{23} Respondent purported to represent Bruce and Ruth in the guardianship and conservatorship proceeding before Judge Vanzi, yet filed two lawsuits in

federal court seeking to drastically alter Bruce's estate in favor of Ruth. In the Moody Bible lawsuit, Respondent was representing Ruth individually, and purportedly Bruce, "by Ruth Clinesmith, his attorney-in-fact." Respondent was seeking to void the trusts created by Bruce and to have the corpus of the trusts declared community property. Ruth's interest in gaining control of the trusts was obviously adverse to Bruce's interest in keeping the trusts as he prepared them. With the filing and settlement of the Citigroup suit, Respondent was representing Ruth, individually, whose interests were adverse to Bruce's, violating Rule 16-107(A). Although the Citigroup complaint filed by Respondent requested Ruth's full access to the account as Bruce's co-tenant, Respondent negotiated the removal of the assets from Bruce and Ruth's joint account and the placement of those assets in an individual account in Ruth's name only. Ruth's interests were clearly adverse to Bruce's interests and Respondent was representing both of them, an obvious violation of Rule 16-107(A).

{24} Additionally, Respondent's representation of Bruce was materially limited by his representation of Ruth, a violation of Rule 16-107(B). We have no difficulty seeing how representing Ruth limited Respondent's ability to represent Bruce. Ruth clearly had an adverse interest in the outcome of the guardian and conservatorship proceeding and the federal suits, as each would affect her ability to control Bruce's finances. We agree with the hearing committee that

Respondent should have seen the adverse implications of dual representation in this situation.

{25} Furthermore, the complaint prepared and filed by Respondent in the Moody Bible lawsuit alleges that in August 2004, when Bruce and Ruth relocated to Albuquerque, Bruce was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis." Additionally, Respondent acknowledged in the complaint he filed in the Citigroup case that Bruce's competence was questionable. Accordingly, the court had appointed a guardian *ad litem* for Bruce before Respondent filed these lawsuits. Later, the court found that good cause existed to appoint a temporary guardian and conservator for Bruce and appointed Decades LLC in that capacity. What is so reprehensible to this Court is that Respondent, acknowledging that Bruce's mental capacity was in question, attempted to take money from him and transfer it to Ruth, while purporting to represent both of them. Certainly, Respondent's ability to represent Bruce was compromised.

{26} Respondent argued before the hearing committee that any potential conflict was waived by both Bruce and Ruth and that Bruce was competent. However, as noted above, whether the lawyer reasonably could believe that the representation would not adversely affect the lawyer's relationship with the other client is determined by an objective standard. *See In re Houston,* 1999-NMSC-032, ¶ 12, 127 N.M. 582, 985 P.2d 752. Applying the objective standard in *Houston,* we conclude that it was not reasonable for

Respondent to believe these conflicts could be waived. As this Court said, "reasonable" means "the conduct of a reasonably prudent and competent lawyer." *In re Houston,* 1999-NMSC-032, ¶ 12, 127 N.M. 582, 985 P.2d 752. Simply put, a reasonably prudent lawyer would not have acted as Respondent did.

{27} Through his actions in the Moody Bible lawsuit and the state court guardianship proceedings, Respondent also violated Rule 16-109(A), which provides "that [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." As noted in the federal order disqualifying Respondent from representing any party and from participating in any manner in the Moody Bible lawsuit, Bruce had an attorney-client relationship with Respondent, the Moody Bible lawsuit involved a matter substantially related to Respondent's prior representation of Bruce in the state court proceeding, and Ruth's interests were materially adverse to Bruce's interests. As such, Respondent engaged in an obvious violation of Rule 16-109(A) by representing a person (Ruth) in the same or a substantially related matter in which that person's interests were materially adverse to those of a former client (Bruce) and without the consent of the former client.

{28} Although the hearing committee did not specifically conclude that Respondent's actions in having

Bruce execute a new will and trust in Ruth's favor constituted a violation of the conflict of interest provisions of the Rules, we exercise our independent authority to so conclude. *See Bristol,* 2006-NMSC-041, ¶ 18, 140 N.M. 317, 142 P.3d 905 (recognizing de novo review of hearing committee's conclusions of law). Respondent was disqualified from representing Bruce when he went to the Woodmark. If he was purporting to represent Ruth, as he claimed he was when Judge Vanzi was considering whether to revoke the new will and trust, then this is another obvious instance where Respondent was in violation of Rule 16-109(A).

C. Misrepresentation and Misleading the Court

{29} Respondent also argues there was not substantial evidence to prove that he engaged in misrepresentations during the course of his attempts to represent Bruce and Ruth in the various state and federal court proceedings. Rule 16-804(C) states, "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The hearing committee found that due to Respondent's actions in the Moody Bible lawsuit, the Citigroup lawsuit, and the Woodmark visit, Respondent violated Rule 16-804(C) by engaging in conduct involving misrepresentation. There is ample proof for this conclusion.

{30} The history of this case begins with a guardianship and conservatorship proceeding before Judge Vanzi. NMSA 1978, Section 45-5-402 (1975) grants exclusive jurisdiction to the court in which a petition for guardianship or conservatorship is filed "to determine how the estate of the protected person which is subject to the laws of New Mexico shall be managed, expended or distributed to or for the use of the protected person or any of his dependents." Aware of the guardianship proceeding and the appointment of a temporary guardian for Bruce, Respondent filed two lawsuits in federal court, in effect seeking to remove those assets from the jurisdiction of the state district court. He did so without notifying Judge Vanzi, Richard Reidy, Bruce's guardian *ad litem,* or the petitioner in the guardianship and conservatorship proceeding.

{31} In addition, Respondent never notified the federal courts of the pending guardianship and conservatorship proceeding. Indeed, when Judge Vanzi appointed Decades LLC as Bruce's temporary guardian and conservator, Respondent never notified the federal courts of such appointment. In fact, when Respondent was disqualified from representing Bruce, and later Ruth, he never notified the federal courts. When Judge Vanzi revoked Ruth's power of attorney, Respondent never notified Citigroup, with whom he negotiated a settlement in the case, that the power of attorney he relied on to negotiate the settlement had been revoked.

{32} The hearing committee also concluded that Respondent engaged in conduct constituting misrepresentation when he visited the Woodmark. The testimony by deputy disciplinary counsel's witnesses is not contradicted by Respondent's testimony or by that of his witnesses. After having been disqualified from representing Bruce, after Decades LLC had been appointed Bruce's temporary guardian and conservator, and notwithstanding his own recognition of Bruce's incapacity, Respondent nevertheless induced Bruce to execute a new will and trust. The new will and trust would have removed all of Bruce's assets from the jurisdiction of the state court and would have made Ruth trustee with all the power "that an absolute owner of such property would have." Respondent managed to have Bruce sign new legal documents without notifying Richard Reidy, the guardian *ad litem*, or Decades LLC, the temporary guardian and conservator. Nor did Respondent obtain leave of the court to visit Bruce. Taken together, all of these actions support the hearing committee's conclusion that Respondent's conduct associated with the Woodmark visit amounted to misrepresentation in violation of Rule 16-804(C).

{33} Additionally, by reason of Respondent's conduct in the Moody Bible lawsuit, we find that Respondent violated Rule 16-102(D), which states, "A lawyer shall not engage, or counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or which misleads the court. . . . " Respondent did not notify the federal court handling the

Moody Bible lawsuit when he was disqualified from representing Bruce or when he was subsequently disqualified from representing Ruth. By continuing with the Moody Bible lawsuit, Respondent assisted Ruth in engaging in conduct he knew to be misleading to the federal court. His motion to vacate an initial scheduling order on behalf of Bruce and Ruth is evidence of his continuing actions taken to mislead the federal court.

{34} Throughout these proceedings, Respondent has suggested he did not misrepresent his authority to represent Bruce or Ruth because he never expressly discussed the actions the state and federal courts had taken to disqualify him. For example, the hearing committee asked Respondent questions regarding the power of attorney that Respondent had sent to the attorney for Smith Barney in settlement of the Citigroup suit. This power of attorney was revoked by Judge Vanzi and Respondent never notified either Smith Barney or Citigroup that the power of attorney had been revoked. When asked about the circumstances surrounding this situation, Respondent said, "I didn't mislead him in saying that the power of attorney is in current force and effect." Respondent also said, "He didn't ask me if it was still in full force and effect. If you don't ask the right question, I won't give you the right answer." Statements like this reveal Respondent's disturbingly skewed perception of what it means to be truthful.

{35} "Lawyers are officers of the court and are always under an obligation to be truthful to the

court." *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 339, 695 P.2d 483, 489 (1985). "'Candor and honesty are a lawyer's stock and trade. Truth is not a matter of convenience. Sometimes lawyers may find it inconvenient, embarrassing, or even painful to tell the truth.'" *In re Mikus*, 2006-NMSC-012, ¶ 9, 139 N.M. 266, 131 P.3d 653 (per curiam) (quoting *In re Scavone*, 106 N.J. 542, 524 A.2d 813, 820 (1987)). As we have previously recognized, misrepresentation can be by either commission or omission. *Id.*

{36} Respondent had a duty to inform the court and interested parties in the guardianship and conservatorship proceeding of the filing of the federal lawsuits, but he did not. Respondent also had a duty to inform those parties of his visit to the Woodmark, a visit he should not have made in the first place, but he did not. Respondent had a duty to disclose to the federal court in the Moody Bible lawsuit what had transpired regarding the guardianship and conservatorship proceeding, particularly his disqualification, but he did not. Respondent had a duty to inform Citigroup and the federal court handling the case that the power of attorney had been revoked, but he did not. In short, Respondent did a serious disservice to his clients and the courts by withholding such necessary information. We accordingly conclude that Respondent's silence and continued course of conduct within the various proceedings under these circumstances rises to the level of misrepresentation.

{37} Based upon the aggregate of Respondent's conduct, the hearing committee also concluded that

Respondent engaged in conduct that was prejudicial to the administration of justice, violating Rule 16-804(D), and engaged in conduct adversely reflecting on his fitness to practice law, violating Rule 16-804(H). This Court has concluded that similar conduct violates Rule 16-804(D) and (H) in other disciplinary cases. *See, e.g., In re Archuleta,* 122 N.M. 52, 54-55, 920 P.2d 517, 519-20 (1996) (per curiam) (recognizing that attorney's intentional failure to report to the bankruptcy court fees he received amounted to violation of rules of professional conduct prohibiting conduct prejudicial to the administration of justice); *In re C'de Baca,* 109 N.M. 151, 152, 782 P.2d 1348, 1349 (1989) (per curiam) (noting that use of knowledge of former client's assets to request loans for ventures in gold ore processing and a private pay-phone company and conduct involving dishonesty or misrepresentation in dealings with client was conduct prejudicial to the administration of justice and conduct adversely reflecting on fitness to practice law).

{38} We therefore uphold the hearing committee's conclusions that the aggregate of Respondent's conduct was prejudicial to the administration of justice and reflected adversely on Respondent's fitness to practice law in violation of Rule 16-804(D) and (H).

D. Communication with Person Represented by Counsel

{39} In addition, we hold that Respondent's actions in relation to the Woodmark visit constitute a

violation of Rule 16-402, which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Respondent's actions in going to the Woodmark, speaking with Bruce about executing a new will and trust, and, in fact, getting him to execute the new will and trust without notifying Bruce's guardian and conservator, is inexcusable. Whether Respondent purported to represent Bruce or Ruth at this time is of no consequence. The subject matter of the visit was Bruce's finances, and when executing a new will and trust, the legal representatives appointed by the court or hired by Decades LLC should have been present. Respondent did not obtain consent from Decades LLC to take these actions and he had no alternate legal authorization to do so. Accordingly, we agree with the hearing committee's conclusion that Respondent's conduct in this regard also violated Rule 16-402.

E. Respondent's Procedural Challenges

{40} Respondent has argued throughout these proceedings that the disciplinary board disregarded the New Mexico Rules Governing Discipline, engaged in prosecutorial misconduct, and violated his due process rights. Respondent argues that those purported procedural violations warrant a dismissal of the charges against him. The Court concludes that

Respondent's arguments have no merit and that he has failed to show any prejudice as a result of these alleged procedural violations.

{41} First, Respondent alleges that the board did not follow Rule 17-307(C) NMRA, which requires that the Respondent be advised of the "general nature of the allegations" and be given "a fair opportunity to present any matter of fact or mitigation the respondent-attorney wants disciplinary counsel to consider." Deputy disciplinary counsel sent Respondent a copy of the complaint filed by Judge Vanzi and requested a response.

{42} Respondent's interpretation of Rule 17-307(C) would require that deputy disciplinary counsel "articulate all acts considered to be violations of every Rule of Professional Conduct for which they intend to incorporate in a formal specification of charges. . . . " However, the Rule states that "the respondent-attorney shall always be advised of the *general* nature of the allegations." Rule 17-307(C) (emphasis added). Judge Vanzi's letter gave detailed information regarding the general nature of the allegations so as to put Respondent on notice as to the charges against him. Rule 17-307(C) does not require more.

{43} Respondent alleges that deputy disciplinary counsel did not write a summary report or include any opposing positions as required by Rule 17-307(D) before referring the case to a reviewing officer. Respondent also argues that by this violation, deputy disciplinary counsel violated his confidentiality rights

under Rule 17-304 NMRA. Additionally, Respondent argues that because there was never an intention by deputy disciplinary counsel to resolve the matter with a dismissal or informal admonition under Rule 17-104(B) NMRA, it was a violation of Rule 17-307(D) for deputy disciplinary counsel to seek review by a reviewing officer. However, deputy disciplinary counsel explains that the case was referred to Norman S. Thayer because of his expertise in the area, and he was requested to give an advisory opinion on conflict of interest questions. As such, deputy disciplinary counsel did not use Mr. Thayer as a reviewing officer for the purpose of approving or disapproving dismissals of complaints for formal investigation and offers of informal admonitions, making Rule 17-104(B) inapplicable.

{44} Moreover, pursuant to Rule 17-307(A), deputy disciplinary counsel was authorized, as part of the initial investigation, to refer this matter "to an appropriate assistant counsel or commissioned investigator for report and recommendations." Mr. Thayer is, therefore, more properly viewed as a "commissioned investigator" or "assistant counsel" under Rule 17-307(A). Thus, the referral did not violate Respondent's confidentiality rights because this is an action deputy disciplinary counsel is authorized to take pursuant to Rule 17-307. Moreover, the referral to a commissioned investigator or assistant counsel was of potential benefit to Respondent because deputy disciplinary counsel was, in essence, getting a second opinion as to whether certain matters were

appropriate to pursue. Given that the referral was authorized by the rules and could have benefitted Respondent, we perceive no procedural violation or prejudice as a result of deputy disciplinary counsel's decision to refer the case for advice as a part of his investigation of the matter. *See In re Castellano,* 119 N.M. 140, 144, 889 P.2d 175, 179 (1995) (per curiam) (holding that an assertion of prejudice is not a showing of prejudice).

{45} Next, Respondent argues that the disciplinary board failed to follow Rule 17-307(E), requiring that chief disciplinary counsel approve charges prior to filing. Although deputy disciplinary counsel acknowledges that there was no written documentation of approval, there was evidence that chief disciplinary counsel did, in fact, approve the charges. Also, as deputy disciplinary counsel correctly points out, there is no requirement in Rule 17-307(E) that the approval be in writing. *See* Rule 17-307(E) (stating that deputy disciplinary counsel shall present a draft of the proposed specification of charges to chief disciplinary counsel prior to filing, and chief disciplinary counsel shall approve the filing of the charges or recommend an alternate course of action). We therefore find no error on this point.

{46} Next, Respondent argues that fraud was not pleaded with particularity in the specification of charges as required by Rule 1-009(B) NMRA, which states, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Respondent's argument is

that this rule applies to pleadings in disciplinary cases and that it was not followed. *See* Rule 17-301(B) NMRA (stating that the Rules of Civil Procedure for the District Courts of New Mexico apply to disciplinary proceedings, except where clearly inapplicable). Without deciding whether Rule 1-009(B) applies to disciplinary cases in New Mexico involving allegations of fraud or misrepresentation, we simply note that deputy disciplinary counsel met the standard in this case by particularizing the instances of misrepresentation sufficiently in the specification of charges so as to leave no doubt in Respondent's mind as to the charges asserted against him. *See Steadman v. Turner,* 84 N.M. 738, 740, 507 P.2d 799, 801 (Ct.App.1973) (noting that in pleading a claim of fraud, the evidentiary details of the claim need not be alleged); *Romero v. Sanchez,* 83 N.M. 358, 359, 492 P.2d 140, 141 (1971) (concluding that in the aggregate, the allegations alleged with sufficient particularity a fraudulent plan, scheme, or design). *See Delgado v. Costello,* 91 N.M. 732, 734, 580 P.2d 500, 502 (Ct.App.1978) (recognizing that even if the word fraud is not used in the pleadings, the allegations should leave no doubt in the defendants' minds as to the fraud claims asserted against them). In conclusion, the specification of charges filed by deputy disciplinary counsel met the pleading requirements of Rule 1-009(B), because the particular factual allegations were alleged in detail and the rules were stated with specificity so as to leave no doubt as to the charges against Respondent.

{47} Respondent also argues that the disciplinary board engaged in prosecutorial misconduct during these proceedings. First, Respondent argues that the failure of chief disciplinary counsel to review any proposed formal specification of charges before filing by deputy disciplinary counsel constitutes prosecutorial misconduct. As addressed above, chief disciplinary counsel did ultimately approve the charges and there is no requirement that the approval be in writing.

{48} Secondly, he argues that deputy disciplinary counsel gave false statements in two instances. The first instance involves the sequestered file in the guardianship and conservatorship proceeding before Judge Vanzi, and whether the materials from the file could be used in Respondent's disciplinary proceeding. Respondent filed a motion in limine stating that materials from a sequestered file could not be used outside the proceeding. Deputy disciplinary counsel stated to the hearing committee that Judge Vanzi's complaint letter was accompanied with materials from the sequestered case, and therefore it could be used in the disciplinary case. The hearing committee denied Respondent's motion.

{49} However, Respondent found a letter to deputy disciplinary counsel from Judge Vanzi specifically informing deputy disciplinary counsel that he could not use the materials from the sequestered file and that they had to be kept confidential. Armed with this letter, Respondent filed a motion for rehearing, and the hearing committee reversed its ruling, stating that no documents from the sequestered file would be

"entered into evidence unless and until there's an order from Judge Vanzi releasing specific documents and setting forth the conditions under which they may be admitted in this proceeding and to be used in this proceeding." Respondent argues that deputy disciplinary counsel's statements were intentional misrepresentations to the hearing committee and constitute prosecutorial misconduct.

{50} The hearing committee admonished deputy disciplinary counsel for not disclosing the letter. Deputy disciplinary counsel stated to the hearing committee, "There's no question I received the letter. It was just not something that was on my radar screen at the time, and that's all I can say about the letter." Deputy disciplinary counsel said further, "there was no intent on my part to mislead the hearing committee." Respondent asked that the hearing committee dismiss his case for prosecutorial misconduct and the committee denied this motion. In denying Respondent's motion, the chair of the hearing committee stated:

> Mr. Stein, I have made my displeasure with the way Mr. Widman handled and addressed the confidentiality issue very clear already in this case. I don't think it was handled properly. I think it could have been handled much more professionally and expeditiously, but it was not. Nonetheless, I do not believe that there is any ground to dismiss for prosecutorial misconduct.

The other committee members concurred.

{51} A deferential standard of review is used by this Court to review the hearing committee's findings of fact. *See In re Bristol,* 2006-NMSC-041, ¶ 15-17, 140 N.M. 317, 142 P.3d 905. As this Court stated:

> [T]he hearing committee is the only entity designated to take evidence during the course of a formal disciplinary proceeding. *See* Rule 17-314(C); *see also* Rule 17-313. Because the hearing committee directly observes witness testimony, it is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence.

Id. ¶ 15. As such, the evidence must be viewed in the light most favorable to the hearing committee's implicit decision that deputy disciplinary counsel did not intentionally mislead the committee regarding confidentiality of the documents from Judge Vanzi.

{52} Respondent's third alleged instance of prosecutorial misconduct deals with another disputed issue in these proceedings: whether deputy disciplinary counsel misrepresented his intent not to rely on collateral estoppel during the course of the disciplinary proceedings below. Respondent argued below that the orders entered by the state and federal judges in the Clinesmith matters could not be used as proof in this disciplinary case because he did not have a chance to fully litigate the validity of the orders. Respondent's argument is premised on the principle that a party against whom collateral estoppel is

sought must have had a full and fair opportunity to litigate the issue in the prior actions. *See Deflon v. Sawyers,* 2006-NMSC-025, ¶ 14, 139 N.M. 637, 137 P.3d 577.

{53} Deputy disciplinary counsel responded below that collateral estoppel was not being used against Respondent. Instead, deputy disciplinary counsel argued that Respondent was barred from collaterally attacking the orders he was charged with violating. Deputy disciplinary counsel pointed out that Respondent has continually attempted to collaterally attack Judge Vanzi's orders by showing that he did not have a fair hearing on the issues that were the subject of the orders. As deputy disciplinary counsel stated in his brief to the hearing panel, "[a] party who disobeys an order may not collaterally attack the validity of the underlying order in the course of an appeal from a judgment holding the party in criminal contempt of court for violating the order." *In re Philip Kleinsmith,* 2005-NMCA-136, ¶ 11, 138 N.M. 601, 124 P.3d 579 (citing *State v. Cherryhomes,* 114 N.M. 495, 498, 840 P.2d 1261, 1264 (Ct.App.1992)). Deputy disciplinary counsel also pointed out to the hearing committee that Respondent could have appealed his disqualification by Judge Vanzi, but he did not do so. *See Weeks v. Indep. Sch. Dist.,* 230 F.3d 1201, 1207 (10th Cir.2000) ("Counsel have standing to appeal orders that directly aggrieve them."); *see also Cherryhomes,* 114 N.M. at 498, 840 P.2d at 1264 (holding that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties

until it is reversed by orderly and proper proceedings" and the "[w]illful violation of a court's order . . . cannot be tolerated" (internal quotation marks and citations omitted)). Although the hearing committee did not make a specific finding as to deputy disciplinary counsel's conduct on this issue, we conclude that deputy disciplinary counsel was simply making a valid legal argument regarding the effect of the district court orders and was not breaching some purported commitment not to use collateral estoppel against Respondent.

{54} In addition to rejecting the factual bases for Respondent's claim of prosecutorial misconduct, we also question Respondent's reliance on the concept of prosecutorial misconduct within the context of a disciplinary proceeding. Relying on the three instances of what Respondent characterizes as prosecutorial misconduct described above, Respondent cites to *State v. Breit,* 1996-NMSC-067, ¶ 37, 122 N.M. 655, 930 P.2d 792, for support. In *Breit,* this Court adopted a standard of willful disregard for determining when retrial is barred because of prosecutorial misconduct. *Id.* ¶ 32. The prosecutor's conduct in *Breit* was described as "pervasive, incessant, and outrageous," which is how Respondent characterizes deputy disciplinary counsel's actions. *Id.* ¶ 37.

{55} The alleged actions of deputy disciplinary counsel in no way compare to the actions of the prosecutor in *Breit.* By contrast, Respondent only points to three instances of purported misconduct. As discussed above, viewing the evidence in the light

most favorable to the hearing committee's findings regarding the issue of prosecutorial misconduct, there is no indication that deputy disciplinary counsel proceeded in bad faith or engaged in the level of misconduct contemplated by *Breit,* assuming of course, that *Breit* even applies in this context.

{56} Finally, Respondent argues continually throughout these proceedings that he was denied discovery and that the specification of charges should have been dismissed for failure to put him on notice of his actual actions that corresponded to the claimed violations of the Rules of Professional Conduct. We have already rejected Respondent's challenges to the adequacy of the specification of charges for the reasons discussed earlier in this opinion. In addition, we conclude that no facts were found or conclusions drawn that were not alleged in the specification of charges. We also previously rejected Respondent's claims of inadequate discovery when we denied Respondent's petition for extraordinary writ and emergency request for stay filed with this Court earlier in these proceedings.

{57} The record reflects that Respondent received the entire disciplinary board file prior to the hearing. All of the exhibits were available to him, there was nothing he had not seen before, and there was no allegation by Respondent that he was, in fact, specifically prejudiced by any lack of discovery. *See Castellano,* 119 N.M. at 144, 889 P.2d at 179 (holding that an assertion of prejudice is not a showing of prejudice).

{58} Respondent has repeatedly attempted to assert prejudice in terms of his surprise at the hearing committee's conclusions of law and not as to the evidence relied on by the hearing committee. In fact, the hearing panel brought this to Respondent's attention, stating that "discovery is for facts, not for law." To ensure that Respondent was not prejudiced by any purported lack of discovery, the hearing panel finally asked Respondent to go through each of the findings of the hearing committee and "identify specifically the ones that are not supported or that you are prejudiced because there wasn't discovery, and somehow you would have proved something different." In response, Respondent discussed his objections to some of the findings, but did not point to specific instances where a lack of discovery prejudiced his ability to challenge the evidence in support of these findings. After this thorough questioning, the hearing panel concluded that "[t]he hearing committee did not abuse its discretion in denying Respondent discovery. Respondent was not prejudiced or surprised by the evidence presented by Deputy Disciplinary Counsel and Respondent was given a full opportunity to answer all charges."

{59} We find no basis for overturning the panel's decision in this regard. In fact, Respondent was asked before this Court, "Was there anything at the hearing that surprised you, in terms of not knowing of its existence before?" Respondent replied, "I don't think so, but I didn't know what the impact was." While Respondent may have been in denial about the

gravity of his actions, we have no doubt that Respondent was not surprised by evidence submitted in the hearings below, and that he was in no way prejudiced by any purported lack of discovery.

F. Appropriate Discipline

{60} Although the hearing panel adopted the hearing committee's findings and conclusions with regard to Respondent's conduct and violation of the Rules of Professional Conduct, the hearing panel disagreed with the hearing committee's recommendation to discipline Respondent with a suspension. Instead, the hearing panel recommended to this Court that Respondent be disbarred. The disagreement between the hearing committee and the hearing panel notwithstanding, this Court independently determines the appropriate level of discipline. *See Bristol*, 2006-NMSC-041, ¶¶ 18, 30, 140 N.M. 317, 142 P.3d 905. In this regard, this Court looks to the *ABA Standards for Imposing Lawyer Sanctions* (1992) for guidance in determining appropriate lawyer disciplinary sanctions. *In re Key*, 2005-NMSC-014, ¶ 5, 137 N.M. 517, 113 P.3d 340.

1. Intentional Conduct

{61} Within the framework of the *ABA Standards*, disbarment is generally deemed appropriate for intentional misconduct, suspension for knowing misconduct, and reprimand for negligent misconduct. As deputy disciplinary counsel pointed out to the

hearing panel, this Court has repeatedly noted that a pattern of intentional conduct warrants disbarment. *See, e.g., In re Arrieta,* 105 N.M. 418, 420, 733 P.2d 866, 868 (1987) (per curiam); *In re C'de Baca* 109 N.M. at 153, 782 P.2d at 1350. Furthermore, "[w]hen an attorney is found to have engaged in acts of intentional dishonesty, there is a presumption that he or she is unfit for membership in the bar of this state." *In re Romero,* 2001-NMSC-008, ¶ 10, 130 N.M. 190, 22 P.3d 215 (per curiam) (internal quotation marks and citation omitted).

{62} There is ample evidence to prove that Respondent knowingly and intentionally violated the Rules of Professional Conduct. Respondent knowingly failed to avoid a conflict of interest by purporting to represent Bruce and Ruth in the guardianship and conservatorship proceeding, yet at the same time filing two lawsuits seeking to drastically alter Bruce's estate in favor of Ruth, while acknowledging Bruce's potential incapacity. *See* Section 4.31 (stating that a lawyer's intentional simultaneous representation of clients with adverse interests and a lawyer's intentional representation of a client with materially adverse interests to those of another client or former client in a substantially related matter can be cause for disbarment). Further, Respondent intentionally continued to represent Bruce and Ruth after he was disqualified from doing so, which constitutes misrepresentation to the court. *See* Section 6.11 (stating that a lawyer's intentional falsification, deceit, or withholding of material information can be cause for

disbarment). In addition, while the guardianship and conservatorship case was pending, Respondent engaged in misrepresentation and intentional deceit to the court by filing the two federal suits without notifying the court or other interested parties, and having Bruce change his will and trust after being ordered to discontinue his representation of Bruce. *Id.; see also* Section 5.11 (stating that "disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice").

{63} Respondent argued before the hearing committee that Judge Vanzi's order was not clear, that it contained no prohibition on Respondent changing Bruce's testamentary documents, and that he did nothing wrong. His claims to the contrary notwithstanding, Respondent intentionally violated the plain terms of Judge Vanzi's order, which reads:

> The interests of Bruce C. Clinesmith and Ruth M. Clinesmith are adverse to each other in this proceeding and in the federal proceedings currently pending. Representing both individuals in these proceedings constitutes an impermissible conflict of interest and neither Stuart L. Stein, Esq. or The Stein Law Firm can continue to represent the interests of Bruce C. Clinesmith.

See Section 6.21 (stating that "disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit

for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding").

{64} As noted above, ignoring a judge's order, whether one agrees or disagrees with it, is impermissible. There are avenues for appealing judges' orders and Respondent did not avail himself of those options. *See Weeks,* 230 F.3d at 1207 ("Counsel have standing to appeal orders that directly aggrieve them."); *Cherryhomes,* 114 N.M. at 498, 840 P.2d at 1264 (holding that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings" and the "willful violation of a court's order . . . cannot be tolerated") (internal quotation marks and citations omitted). Respondent cannot now attack the validity of Judge Vanzi's orders simply because his unethical conduct is now cause for his disbarment.

2. Aggravation and Mitigation

{65} In considering the appropriate level of discipline, this Court may consider aggravating and mitigating factors to either increase or reduce the degree of discipline imposed. *See ABA Standards,* Sections 9.1 to 9.3. In formulating its recommendations, the hearing committee considered several factors in aggravation, including Respondent's history of prior disciplinary offenses, his commission of

multiple offenses, his refusal to acknowledge the wrongful nature of his conduct, and his substantial experience in the practice of law.

{66} In reviewing the hearing committee's disciplinary recommendations, the hearing panel found further aggravating factors of dishonest or selfish motive and vulnerability of the victim. The panel concluded that no mitigating factors existed. The hearing panel ultimately concluded that Respondent should be disbarred from the practice of law for not less than five years and that a motion for permission to apply for reinstatement not be filed for a period of at least five years from the effective date of the disbarment pursuant to Rule 17-214 NMRA. *See In re Bristol*, 2006-NMSC-041, ¶ 3, 140 N.M. 317, 142 P.3d 905 (stating that the hearing panel may accept, reject, modify or increase the sanctions contained in the recommendations of the hearing committee). We agree with the hearing panel's assessment that disbarment is the appropriate level of discipline in this case.

{67} Throughout these proceedings, and before this Court, Respondent has maintained he did nothing wrong. Respondent's attitude during these proceedings and answers to questions asked regarding issues in the case give cause for alarm.

{68} For example, when asked by the hearing panel about Judge Vanzi's order previously cited in this opinion, and what the words "this proceeding" meant, the panel asked if that means "this proceeding

dealing with [Bruce Clinesmith's] estate." Respondent said, "[n]o, I don't know what it means." Respondent then answered that "[t]he proceeding was a guardianship and conservatorship proceeding." The panel then asked, "Isn't that concerned with the assets in the estate of the person?" to which Respondent replied, "[s]ure it is. But I didn't do anything." This is just one of many examples where Respondent refuses to accept the order as it is, puts unreasonable interpretations on it, and then insists that he has done nothing wrong.

{69} Another example of Respondent's state of denial concerns his visit to the Woodmark to have Bruce execute a new will and trust. When Respondent was before Judge Vanzi, Respondent did not dispute that he did not notify Bruce's guardian *ad litem,* or his temporary guardian and conservator, of his visit to the Woodmark. When asked by Judge Vanzi why he did this, Respondent replied, "[i]n this case this is what I did and I feel that it is fine. It is ethical and not in contravention of your order." In light of what Respondent knew and what he intentionally did, it is, to say the least, troubling that he has steadfastly maintained that he has acted ethically.

{70} As further evidence of Respondent's denial and refusal to account for his actions, Respondent filed a motion for rehearing with this Court following the announcement of his disbarment. Respondent again makes the same arguments he has continually made throughout these proceedings and raises no new

issues. In particular, Respondent claims that Bruce's incapacity was not at issue during the proceedings. However, Respondent acknowledged in the federal suits he filed and in his statements to Judge Vanzi that Bruce's capacity was in question. Similarly, Respondent claims he did not know that his failure to abide by court orders would be used as grounds for discipline. As is obvious from what is set forth above, there is no doubt that Respondent had knowledge of the charges against him regarding his conduct related to the court orders and that such conduct could result in disciplinary action.

{71} "It is the obligation of the organized bar and the individual lawyer to give unstinted cooperation and assistance to the Supreme Court, and its agency the disciplinary board, in discharging its function and duty with respect to discipline and in purging the profession of the unworthy." Preface, *Rules Governing Discipline,* 17-101 to -316. Contrary to this obligation, throughout these proceedings Respondent has expressed disdain and contempt for the disciplinary board. He has expressed publicly, through the use of his web site, his displeasure with disciplinary board members. Much like the situation before us in *In re Quintana,* 104 N.M. 511, 513-14, 724 P.2d 220, 222-23 (1986):

> Rather than recognizing his own shortcomings, he continues to blame others for his acts and omissions. In addition, he has openly chastised disciplinary counsel and this Court for what he evidently perceives as

> unjustified "punishment." Our obligation is to protect the public and the reputation of the profession, and safeguard the administration of justice. [Respondent's] sustained inability to grasp any appreciation of how his conduct falls below the standards set for attorneys or any understanding of his professional obligations convinces us that an extension of the previously imposed sanction is required for the protection of the public.

{72} Were this Respondent's first time before this Court, we might be less inclined to impose the ultimate sanction of disbarment. However, Respondent has other disciplinary offenses. Notably, Respondent received a formal reprimand a mere two years ago for conduct similar to his conduct here. In that case, Respondent created a trust for a client that involved a change to an estate plan, making his son and daughter co-successor trustees. Respondent then represented the adverse interests of the son, while he was still representing the father. As stated in the formal reprimand, "You put yourself in a untenable ethical position by attempting to represent the competing interests of [father] and [son]. This is precisely the type of conduct that the conflict of interest rules are intended to prevent." Several factors in aggravation were found in that proceeding, including history of prior disciplinary offenses, selfish motive, committing multiple offenses, engaging in deceptive practices in responding to the disciplinary process, and substantial experience in the practice of law. This Court has noted that repeated instances of the same

conduct for which a lawyer previously has been disciplined generally will result in more severe discipline. *In re Houston,* 1999-NMSC-032, ¶ 19, 127 N.M. 582, 985 P.2d 752.

III. CONCLUSION

{73} In light of the evidence of repeated intentional misconduct by Respondent, we accept the hearing panel's recommendation for disbarment. Respondent is therefore disbarred from the practice of law pursuant to Rule 17-206(A)(1) NMRA. As previously ordered by this Court, Respondent must comply with all requirements of Rules 17-212 and 17-214 NMRA prior to being permitted to apply for reinstatement. Moreover, as previously ordered by the Court, Respondent shall pay the costs in this matter on or before March 19, 2008; any balance remaining thereafter shall accrue interest at the rate of 8-3/4% per annum; and such costs shall be reduced to a transcript of judgment.

{74} Finally, Respondent's motion for rehearing is denied.

{75} **IT IS SO ORDERED.**

APPENDIX B

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT OF
THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to
Practice Before the Courts
of the State of New Mexico

Disciplinary No.
02-2006-505

DECISION OF THE HEARING PANEL

THIS MATTER came before the undersigned Disciplinary Board Panel for oral argument on July 30, 2007, after assignment for review by the Chair of the Disciplinary Board pursuant to Rule 17-314 of the Rules of Governing Discipline. The Respondent and Joel L. Wildman, Deputy Disciplinary Counsel, appeared in person. The proceedings were stenographically recorded. The Board Panel reviewed the transcripts of the Panel Hearing, pleadings filed in the case, the briefs filed by the parties, and heard the arguments of counsel on the issues in each parties Request for Oral Argument and Submission of Briefs and pleadings filed in the case.

The Board Panel finds as follows:

1. Respondent basically agreed with each Finding of Fact of the Hearing Committee with his limited objections being either stylistic or immaterial to the conclusions.

2. The evidence supports the Findings of Fact and Conclusions of Law of the Hearing Committee, which are approved by the Panel.

3. The Hearing Committee did not abuse its discretion in denying Respondent discovery. Respondent was not prejudiced or surprised by the evidence presented by Deputy Disciplinary Counsel and Respondent was given a full opportunity to answer all charges.

4. Respondent was not denied due process by the Hearing Committee, nor did the actions of Chief Disciplinary Counsel or the Deputy Disciplinary Counsel constitute "prosecutorial misconduct."

5. Respondent received a Formal Reprimand in Disciplinary No. 06-2003-458 on November 18, 2005, concerning violations of Rule 16-107(a) involving similar conflict of interest issues. Respondent maintains he did not violate the Rules of Professional Conduct therein or in the present preceding.

6. The Disciplinary Board Panel finds the following factors to be considered in imposing sanctions set out in the ABA *Standards For Imposing Sanctions* are supported by the evidence herein:

§4.3 Failure to avoid conflict of interest

§4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of clients:

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of present or former client are materially adverse and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

§5.1 Failure to maintain personal integrity

§5.11 Disbarment is generally appropriate when:

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

§6.1 False statements, fraud and misrepresentation

§6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding.

§6.2 Abuse of the legal process

§6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

§9.0 Aggravation and Mitigation

§9.1 After misconduct has been established aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

§9.22 Factors which maybe considered in aggravation

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(g) refusal to acknowledge nature of conduct;

(h) vulnerability of victim; (the husband who was under court supervision)

(i) substantial experience in the practice of law;

§9.3 Mitigation

§9.31 Mitigation or mitigating circumstances or any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

§9.32 Factors which may be considered in mitigation. (none were found herein)

§9.4 Factors which are neither aggravating or mitigating

(b) agreeing to the client's demand for certain improper behavior or result;

(f) failure of injured client to complain

THEREFORE it is the unanimous recommendation and decision of the Disciplinary Board Panel that he recommendations of the Hearing Committee are nodified as follows:

1. The appropriate sanction in this case is disbarment of Respondent's license to practice law for no less than five (5) years, and a motion for permission to apply for reinstatement may not be filed for a period of at least five (5) years from the effective date of the disbarment pursuant to Rule 17-214.

2. Respondent should be assessed the costs of this action, to be paid within ninety (90) days from this decision.

Respectfully Submitted,

/s/ William G.W. Shoobridge
WILLIAM G.W.
SHOOBRIDGE, ESQ.
Board Panel Chair

/s/ Paul M. Fish
Paul M. Fish, Esq.
Board Panel Member

/s/ David S. Campbell
David S. Campbell, Esq.
Board Panel Member

Dated: August 7, 2007

I certify that a true copy
of the foregoing was e-mailed
and mailed to Joel L. Widman
and Stuart L. Stein this 7th
day of August, 2007.

/s/ William G.W. Shoobridge
William G.W. Shoobridge, Esq.

APPENDIX C

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

HEARING COMMITTEE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS FOR DISCIPLINE

Comes now the Hearing Committee, pursuant to Rule 17-313(D) of the Rules Governing Discipline, and for its Recommended Findings of Facts and Conclusions of Law, states as follows:

FINDINGS OF FACT

1. Stuart L. Stein, Esq., hereinafter Respondent, is an attorney licensed to practice law before the courts of the State of New Mexico.

2. In March, 2005, a Petition was filed by Cathe Temmerman seeking the appointment of a guardian and conservator for her father, Bruce C. Clinesmith, in the matter entitled *In the Matter of Bruce C. Clinesmith, An Adult Incapacitated Person,* No. PQ-2005-00063, in the Second Judicial District Court, Bernalillo County, New Mexico, (Ex. A). Richard Reidy was

appointed guardian *ad litem* by the court on March 4, 2005, (Ex. D).

3. By operation of law, after notice of the filing of a petition seeking the appointment of a conservator, the court in which the petition is filed has exclusive jurisdiction to determine how the estate of the protected person shall be managed, expended or distributed (45-5-402 NMSA 1978 (1975)).

4. On July 18, 2005 a hearing was held before Hon. Linda Vanzi, the judge to whom the guardianship and conservatorship proceeding was assigned on a previously filed Motion To Disqualify Respondent from representing Bruce Clinesmith because of a conflict between the interests of Bruce Clinesmith and his wife, Ruth Clinesmith, who Respondent also represented.

5. During the course of the July 18, 2005, hearing the court disqualified Respondent from representing Bruce Clinesmith, revoked the power of attorney previously granted to Ruth Clinesmith by Bruce Clinesmith and appointed Decades LLC temporary guardian and conservator of Bruce Clinesmith. These rulings are contained in the court's written Order of August 5, 2005, (Ex. N).

6. At the time of the filing of the Petition in the guardianship case there were in existence two trusts created by Bruce Clinesmith. One of the trusts was a revocable trust created by Bruce Clinesmith on January 31, 1997, with Moody Bible Institute of Chicago (hereinafter the "1997 Trust") as Trustee and

which provided, *inter-alia*, for the income and principal to be paid to Bruce Clinesmith as needed with the remainder to Moody upon his death. The corpus of the Moody trust was $6,275,000.00.

7. The other trust (hereinafter the "1999 Trust") was a revocable trust created by Bruce Clinesmith on October 29, 1999, the income and principal of which were to be paid to Bruce Clinesmith as required and upon his death the remainder was to be held in trust for his wife, Ruth, with the income and principal to be paid to her as required. Upon Ruth's death, the remainder was to be paid to Moody. The corpus of the 1999 trust was $4,800,000.00.

8. Respondent appeared on behalf of Bruce C. Clinesmith and his wife, Ruth Clinesmith in Cause No. PQ-2005-00063 and on March 28, 2005, filed an Answer to the Petition on behalf of Bruce Clinesmith and Ruth Clinesmith requesting that Ruth Clinesmith be appointed as guardian for Bruce Clinesmith, if in fact the court determined a guardian should be appointed. The Answer further alleged the existence of a Durable Power of Attorney executed by Bruce Clinesmith on January 30, 2004, in favor of his wife and stated that the court should not disregard the clear intent of Bruce Clinesmith, presumably as evidenced by the Power of Attorney, (Ex. B, Ex. C).

9. On March 28, 2005, the same date on which Respondent filed an Answer to the guardianship/conservatorship Petition, Respondent wrote to representatives of the Moody Bible Institute of Chicago

demanding that the income and corpus of the 1997 Trust and the 1999 Trust be paid to Ruth Clinesmith, individually (Ex. G, par. 27).

10. Notwithstanding his knowledge of the pendency of the guardianship and conservatorship proceeding in state district court together with the above-cited statute, Respondent filed two lawsuits in the United States District Court for the District of New Mexico on behalf of Ruth Clinesmith seeking to affect the manner in which the estate of Mr. Clinesmith would be managed, expended and distributed.

11. The first lawsuit was filed on June 15, 2005 on behalf of Ruth Clinesmith, individually, and purportedly on behalf of Bruce C. Clinesmith, "by Ruth M. Clinesmith, his attorney-in-fact" pursuant to the January 30, 2004, Durable Power of Attorney referred to above, seeking *inter-alia* that the trusts created by Bruce Clinesmith in favor of Moody Bible Institute of Chicago be voided and that the corpus of the trusts be declared to be community property. This lawsuit will be referred to herein as the Moody Bible lawsuit (Ex. G). The value of the trusts at the time of filing was alleged to be approximately $11,000,000.00.

12. The complaint prepared and filed by Respondent in the Moody Bible suit, alleges that in August 2004, when Mr. And Mrs. Clinesmith relocated to Albuquerque, Mr. Clinesmith was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis."

13. On July 18, 2005 a hearing was held before Hon. Linda Vanzi, the judge to whom the guardianship and conservatorship proceeding was assigned on a previously filed Motion To Disqualify Respondent from representing Bruce Clinesmith because of a conflict between the interests of Bruce Clinesmith and his wife, Ruth Clinesmith, who Respondent also represented.

14. During the course of the July 18, 2005, hearing the court disqualified Respondent from representing Bruce Clinesmith, revoked the power of attorney previously granted to Ruth Clinesmith by Bruce Clinesmith and appointed Decades LLC temporary guardian and conservator of Bruce Clinesmith. These rulings are contained in the court's written Order of August 5, 2005 (Ex.N).

15. Respondent did not advise the court in which the Moody Bible suit was pending that he had been disqualified from representing Bruce Clinesmith, that the power of attorney had been revoked or that a temporary guardian and conservator had been appointed for Bruce Clinesmith.

16. On September 1, 2005, an Order was entered in the guardianship and conservatorship proceeding (Ex. S) disqualifying Respondent from any continued representation of Ruth Clinesmith, (Ex. S par. 34).

17. Respondent did not advise the court in which the Moody Bible suit was pending that he had been disqualified from representing Ruth Clinesmith on September 1, 2005.

18. Respondent continued to represent Bruce Clinesmith in the Moody Bible suit after he was disqualified from doing so on July 18, 2005 and continued to represent Ruth Clinesmith after he was disqualified from doing so by the Order of September 1, 2005 as recited by the Order of November 21, 2005 (Ex. U) which disqualified Respondent from representing *any* party to the Moody Bible suit.

19. Respondent continued to represent Ruth Clinesmith in the Moody Bible suit until he was disqualified by the Order of November 21, 2005 and, as recited at page 5 of that Order, continued representing Bruce Clinesmith as well.

20. On June 22, 2005, on behalf of Ruth Clinesmith, individually, Respondent prepared and filed a lawsuit against Citigroup Global Markets, Inc. (the Citigroup lawsuit, Ex. H)) alleging the existence of a joint account in the names of Bruce Clinesmith and Ruth Clinesmith and that the account was restricted by Citigroup without authority. In the lawsuit, Ruth Clinesmith sought damages or, in the alternative, full access to the account.

21. The account, which was alleged to be in the approximate amount of $250,000.00, was "frozen" by Citigroup because of their concerns that Bruce Clinesmith's mental health had deteriorated and their uncertainty that he fully comprehended his actions.

22. Respondent negotiated a settlement of the Citigroup suit pursuant to which the account was transferred to another broker, which account was in

the name of Ruth Clinesmith only, thus barring Bruce Clinesmith access to the account and the funds on deposit therein. The settlement was confirmed in a letters [sic] of July 13, 2005 and July 15, 2005 (Ex. J. Ex. K) sent by Respondent to Citigroup Associate General Counsel. On July 15, 2005, Respondent contacted Citigroup by letter advising of the account to which the funds were to be transferred and again on July 28, 2005 (Ex. L) complaining of delay in effectuating the transfer.

23. Respondent's conduct in the Citigroup case resulted in the removal of assets in excess of $250,000 from the jurisdiction of the court in the guardianship and conservatorship proceeding without notice to or leave of that court.

24. On August 18, 2005, after Respondent had been disqualified from representing Bruce Clinesmith and after Decades LLC had been appointed temporary guardian and conservator of Bruce Clinesmith and notwithstanding his own recognition of Bruce Clinesmith's incapacity, Respondent went to the dementia unit of the Woodmark, a residential care facility in which Bruce Clinesmith was a patient. Respondent had Bruce Clinesmith removed from the dementia unit and taken to a private room, where he presented Bruce Clinesmith with a new will and trust which he asked Bruce Clinesmith to execute and which Bruce Clinesmith did in fact execute.

25. The will and trust executed by Bruce Clinesmith (Ex. O, Ex. P), if not subsequently invalidated by

Judge Vanzi, would have revoked the Moody Bible Trusts and created a new trust with Ruth Clinesmith as trustee with all the power "that an absolute owner of such property would have."

26. The effect of the will and trust executed by Bruce Clinesmith on August 18, 2005 would have been to remove all of the assets of Bruce Clinesmith from the jurisdiction of the court in the guardianship and conservatorship proceeding.

27. Respondent did not notify Richard Reidy, the guardian *ad litem,* or Decades LLC, the temporary guardian and conservator, of his visit to Bruce Clinesmith either before or after the visit nor did Respondent obtain leave of court to make the visit to Bruce Clinesmith.

28. Upon learning of Respondent's meeting with Bruce Clinesmith and Bruce Clinesmith's execution of the will and trust prepared by Respondent, Decades LLC filed a Motion To Prohibit Interference With Temporary Guardian And Conservator Decades, LLC's Performance Of Duties And Exercise Of Powers Pursuant To Court Order Dated August 5, 2005, And Request For Emergency Expedited Hearing (Ex. Q).

29. The court held a hearing of the Decades, LLC Motion on August 22, 2005, and entered an Order, *inter-alia,* enjoining Respondent from having any contact with Bruce Clinesmith, voiding the will and trust executed by Bruce Clinesmith on August 18, 2005, and awarding Decades, LLC the attorneys' fees incurred by it in connection with the Motion.

CONCLUSIONS

30. By reason of the conduct as set forth in Paragraphs 1 through 19 above, Respondent violated the following Rules of Professional Conduct:

a. Rule 16-102(D) by assisting a client (Ruth Clinesmith) to engage in conduct he knew was misleading to the court (Judge Parker);

b. Rule 16-107(A) by representing Ruth Clinesmith whose interests were adverse to those of another client (Bruce Clinesmith).

c. Rule 16-107(B) by representing a client (Bruce Clinesmith) where the representation of that client was materially limited by his representation of another client (Ruth Clinesmith);

d. Rule 16-109(A) by representing a person (Ruth Clinesmith) in the same or a substantially related matter in which that person's interests were materially adverse to those of a former client (Bruce Clinesmith) and without the consent of the former client;

e. Rule 16-804(C) by engaging in conduct involving misrepresentation;

31. By reason of the conduct as set forth in Paragraphs 1-5 and 20 through 23 above, Respondent violated the following Rules of Professional Conduct:

a. Rule 16-107(A) by representing Ruth Clinesmith whose interests were adverse to those of another client (Bruce Clinesmith).

b. Rule 16-107(B) by representing a client (Bruce Clinesmith) where the representation of that client was materially limited by his representation of another client (Ruth Clinesmith);

c. Rule 16-804(C) by engaging in conduct involving misrepresentation;

32. By reason of the conduct set forth in Paragraphs 1-5 and 24 through 29 above, Respondent violated the following Rules of Professional Conduct:

a. Rule 16-402 by communicating during the representation of a client about the subject of the representation with a party he knew to be represented by another lawyer in the matter without the consent of the other lawyer and without authorization of law to do so;

b. Rule 16-804(C) by engaging in conduct involving misrepresentation by failing to obtain leave of Court or otherwise bring this to Judge Vanzi's attention;

33. By reason of the conduct found in paragraphs 30, 31 and 32 to violate the Rules of Professional Conduct, Respondent also violated Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice and Rule 16-804(H), by engaging in conduct

adversely reflecting on Respondent's fitness to practice law.

Recommendations for Discipline

34. On April 2, 2007, the Hearing Committee received evidence and heard argument by the Respondent and the Deputy Disciplinary Counsel with regard to the appropriate discipline to be imposed for the foregoing violations found to have been committed by Respondent. After considering the exhibits submitted by Deputy Disciplinary Counsel and oral argument by the parties, the Committee submits the following recommendations for discipline:

1. Respondent should be suspended from the practice of law for a period of six months with automatic reinstatement.

2. Respondent should be ordered to pay the costs incurred in this proceeding including, but not limited to the cost of depositions, exhibits, transcripts and witnesses.

35. In formulating these recommendations for discipline the Hearing Committee considered factors in aggravation that in the Committee's view justify an increase in the degree of discipline which would ordinarily be imposed for the violations found to have been committed by Respondent, including his history of prior disciplinary offenses, multiple offenses, refusal to acknowledge the wrongful nature of his conduct and his substantial experience in the practice of law.

The foregoing Findings of Fact, Conclusions of Law and Recommendations for Discipline were unanimously adopted by the Hearing Committee this 4th day of April, 2007.

Respectfully submitted,

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee Chair

Telephonically Approved
Gregory W. Chase
Hearing Committee Member

Telephonically Approved
Carolyn Tinker
Hearing Committee Member

APPENDIX D

Rules of Practice of the State Bar of California
Rule 1201. Discovery Requests

Discovery requests served upon an opposing party, as opposed to motions to compel discovery, are not to be filed with the Court.

APPENDIX E

Rules of Practice of the State Bar of California Rule 1202. Format of Discovery Motions

(a) Motion to Compel. A motion to compel further responses to interrogatories, inspection demands, or admission requests and a motion to compel answers to questions propounded at a deposition or to compel production of documents or tangible things at a deposition shall be accompanied by a separate document which sets for each interrogatory, item or category of items, request, question, or document or tangible thing to which further response, answer, or production is requested, the response given, and the factual and legal reasons for compelling it. Material shall not be incorporated by reference, except that in the separate document the moving party may incorporate identical responses and factual and legal reasons previously stated in that document. No other statements or summaries shall be required as part of this motion.

(b) Identification of Interrogatories, Demands, or Requests. A motion for further responses concerning interrogatories, inspection demands, or admission requests shall identify the interrogatories, demands, or requests by set and number.

(c) Reference to Other Responses. If the response to a particular interrogatory is dependent on the response given to another interrogatory, or if the reasons a further response to a particular interrogatory is deemed necessary are based on the responses to

some other interrogatory, the other interrogatory and its response must be set forth.

(d) Reference to Other Documents. If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them shall summarize each relevant document.

(e) Compliance with subparagraphs (a) through (d) of this rule is not necessary where the opposing party has failed to respond to the discovery request.

APPENDIX F

F.S.A. Bar Rule 3-7.6. Procedures Before a Referee

(a) Referees. The chief justice shall have the power to appoint referees to try disciplinary cases and to delegate to a chief judge of a judicial circuit the power to appoint referees for duty in the chief judge's circuit. Such appointees shall ordinarily be active county or circuit judges, but the chief justice may appoint retired judges.

(b) Trial by Referee. When a finding has been made by a grievance committee or by the board that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action, and the formal complaint based on such finding of probable cause has been assigned by the chief justice for trial before a referee, the proceeding thereafter shall be an adversary proceeding that shall be conducted as hereinafter set forth.

(c) Pretrial Conference. Within 60 days of the order assigning the case to the referee, the referee shall conduct a pretrial conference. The purpose of the conference is to set a schedule for the proceedings, including discovery deadlines and a final hearing date. The referee shall enter a written order in the proceedings reflecting the schedule determined at the conference.

(d) Venue. The trial shall be held in the county in which an alleged offense occurred or in the county

where the respondent resides or practices law or last practiced law in Florida, whichever shall be designated by the Supreme Court of Florida; provided, however, that if the respondent is not a resident of Florida and if the alleged offense is not committed in Florida, the trial shall be held in a county designated by the chief justice.

(e) Style of Proceedings. All proceedings instituted by The Florida Bar shall be styled "The Florida Bar, Complainant, v. (name of respondent), Respondent," and "In The Supreme Court of Florida (Before a Referee)."

(f) Nature of Proceedings.

(1) *Administrative in Character.* A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding. The Florida Rules of Civil Procedure apply except as otherwise provided in this rule.

(2) *Discovery.* Discovery shall be available to the parties in accordance with the Florida Rules of Civil Procedure.

(g) Bar Counsel. Bar counsel shall make such investigation as is necessary and shall prepare and prosecute with utmost diligence any case assigned.

(h) Pleadings. Pleadings may be informal and shall comply with the following requirements:

(1) *Complaint; Consolidation and Severance.*

(A) Filing. The complaint shall be filed in the Supreme Court of Florida.

(B) Content. The complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined.

(C) Joinder of Charges and Respondents; Severance. A complaint may embrace any number of charges against 1 or more respondents, and charges may be against any 1 or any number of respondents; but a severance may be granted by the referee when the ends of justice require it.

(2) *Answer and Motion.* The respondent shall answer the complaint and, as a part thereof or by separate motion, may challenge only the sufficiency of the complaint and the jurisdiction of the forum. All other defenses shall be incorporated in the respondent's answer. The answer may invoke any proper privilege, immunity, or disability available to the respondent. All pleadings of the respondent must be filed within 20 days of service of a copy of the complaint.

(3) *Reply.* If the respondent's answer shall contain any new matter or affirmative defense, a reply thereto may be filed within 10 days of the date of service of a copy upon bar counsel, but failure to file such a reply shall not prejudice The Florida Bar. All affirmative allegations in the respondent's answer shall be considered as denied by The Florida Bar.

(4) *Disposition of Motions.* Hearings upon motions may be deferred until the final hearing, and, whenever heard, rulings thereon may be reserved until termination of the final hearing.

(5) *Filing and Service of Pleadings.*

(A) Prior to Appointment of Referee. Any pleadings filed in a case prior to appointment of a referee shall be filed with the Supreme Court of Florida and shall bear a certificate of service showing parties upon whom service of copies has been made. On appointment of referee, the Supreme Court of Florida shall notify the parties of such appointment and forward all pleadings filed with the court to the referee for action.

(B) After Appointment of Referee. All pleadings, motions, notices, and orders filed after appointment of a referee shall be filed with the referee and shall bear a certificate of service showing service of a copy on staff counsel and bar counsel of The Florida Bar and on all interested parties to the proceedings.

(6) *Amendment.* Pleadings may be amended by order of the referee, and a reasonable time shall be given within which to respond thereto.

(7) *Expediting the Trial.* If it shall be made to appear that the date of final hearing should be expedited in the public interest, the referee may, in the referee's discretion, shorten the time for filing pleadings and the notice requirements as provided in this rule.

(8) *Disqualification of Referee.* Upon motion of either party, a referee may be disqualified from service in the same manner and to the same extent that a trial judge may be disqualified under existing law from acting in a judicial capacity. In the event of disqualification, the chief justice shall appoint a successor.

(i) Notice of Final Hearing. The cause may be set down for trial by either party or the referee upon not less than 10 days' notice. The trial shall be held as soon as possible following the expiration of 10 days from the filing of the respondent's answer, or if no answer is filed, then from the date when such answer is due.

(j) The Respondent. Unless the respondent claims a privilege or right properly available under applicable federal or state law, the respondent may be called as a witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues. When the respondent is subpoenaed to appear and give testimony or to produce books, papers, or documents and refuses to answer or to produce such books, papers, or documents, or, having been duly sworn to testify, refuses to answer any proper question, the respondent may be cited for contempt of the court.

(k) Complaining Witness. The complaining witness is not a party to the disciplinary proceeding, and shall have no rights other than those of any other witness. However, unless it is found to be impractical

due to unreasonable delay or other good cause, and after the complaining witness has testified during the case in chief, the referee may grant the complaining witness the right to be present at any hearing when the respondent is also present. A complaining witness may be called upon to testify and produce evidence as any other witness. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution will excuse failure to complete any trial. The complaining witness shall have no right to appeal.

(*l*) Parol Evidence. Evidence other than that contained in a written attorney-client contract may not be used in proceedings conducted under the Rules Regulating The Florida Bar to vary the terms of that contract, except competent evidence other than that contained in a written fee contract may be used only if necessary to resolve issues of excessive fees or excessive costs.

(m) Referee's Report.

(1) *Contents of Report.* Within 30 days after the conclusion of a trial before a referee or 10 days after the referee receives the transcripts of all hearings, whichever is later, or within such extended period of time as may be allowed by the chief justice for good cause shown, the referee shall make a report and enter it as part of the record, but failure to enter the report in the time prescribed shall not deprive the referee of jurisdiction. The referee's report shall include:

(A) a finding of fact as to each item of misconduct of which the respondent is charged, which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding;

(B) recommendations as to whether the respondent should be found guilty of misconduct justifying disciplinary measures;

(C) recommendations as to the disciplinary measures to be applied;

(D) a statement of any past disciplinary measures as to the respondent that are on record with the executive director of The Florida Bar or that otherwise become known to the referee through evidence properly admitted by the referee during the course of the proceedings (after a finding of guilt, all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent); and

(E) a statement of costs incurred and recommendations as to the manner in which such costs should be taxed.

(2) *Filing.* The referee's report and record of proceedings shall in all cases be transmitted together to the Supreme Court of Florida. Copies of the report shall be served on the parties including staff counsel. Bar counsel will make a copy of the record, as furnished, available to other parties on request and payment of the actual costs of reproduction.

(n) The Record.

(1) *Recording of Testimony.* All hearings at which testimony is presented shall be attended by a court reporter who shall record all testimony. Transcripts of such testimony are not required to be filed in the matter, unless requested by a party, who shall pay the cost of transcription directly, or ordered by the referee, in which case the costs thereof are subject to assessment as elsewhere provided in these rules.

(2) *Contents.* The record shall include all items properly filed in the cause including pleadings, recorded testimony, if transcribed, exhibits in evidence, and the report of the referee.

(3) *Preparation and Filing.* The referee, with the assistance of bar counsel, shall prepare the record, certify that the record is complete, serve a copy of the index of the record on the respondent and The Florida Bar, and file the record with the office of the clerk of the Supreme Court of Florida.

(4) *Supplementing or Removing Items from the Record.* The respondent and The Florida Bar may seek to supplement the record or have items removed from the record by filing a motion with the referee for such purpose, provided such motion is filed within 15 days of the service of the index. Denial of a motion to supplement the record or to remove an item from the record may be reviewed in the same manner as provided for in the rule on appellate review under these rules.

(o) Plea of Guilty by Respondent. At any time during the progress of disciplinary proceedings, a respondent may tender a plea of guilty.

(1) *Before Filing of Complaint.* If the plea is tendered before filing of a complaint by staff counsel, such plea shall be tendered in writing to the grievance committee or bar counsel.

(2) *After Filing of Complaint.* If the complaint has been filed against the respondent, the respondent may enter a plea of guilty thereto by filing the same in writing with the referee to whom the cause has been assigned for trial. Such referee shall take such testimony thereto as may be advised, following which the referee will enter a report as otherwise provided.

(3) *Unconditional.* An unconditional plea of guilty shall not preclude review as to disciplinary measures imposed.

(4) *Procedure.* Except as herein provided, all procedure in relation to disposition of the cause on pleas of guilty shall be as elsewhere provided in these rules.

(p) Cost of Review or Reproduction.

(1) The charge for reproduction, when photocopying or other reproduction is performed by the bar, for the purposes of these rules shall be as determined and published annually by the executive director. In addition to reproduction charges, the bar may charge a reasonable fee incident to a request to review disciplinary records or for research into the records of

disciplinary proceedings and identification of documents to be reproduced.

(2) When the bar is requested to reproduce documents that are voluminous or is requested to produce transcripts in the possession of the bar, the bar may decline to reproduce the documents in the offices of the bar and shall inform the requesting person of the following options:

(A) purchase of the transcripts from the court reporter service that produced them;

(B) purchase of the documents from the third party from whom the bar received them; or

(C) designation of a commercial photocopy service to which the bar shall deliver the original documents to be copied, at the requesting party's expense, provided the photocopy service agrees to preserve and return the original documents and not to release them to any person without the bar's consent.

(q) Costs.

(1) *Taxable Costs.* Taxable costs of the proceedings shall include only:

(A) investigative costs, including travel and out-of-pocket expenses;

(B) court reporters' fees;

(C) copy costs;

(D) telephone charges;

(E) fees for translation services;

(F) witness expenses, including travel and out-of-pocket expenses;

(G) travel and out-of-pocket expenses of the referee;

(H) travel and out-of-pocket expenses of counsel in the proceedings, including of the respondent if acting as counsel; and

(I) an administrative fee in the amount of $1250 when costs are assessed in favor of the bar.

(2) *Discretion of Referee.* The referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed.

(3) *Assessment of Bar Costs.* When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated.

(4) *Assessment of Respondent's Costs.* When the bar is unsuccessful in the prosecution of a particular matter, the referee may assess the respondent's costs against the bar in the event that there was no justiciable issue of either law or fact raised by the bar.

APPENDIX G

N.M.R.A. RULE 17-105. DISCIPLINARY COUNSEL

A. Appointment. Subject to the approval of the Supreme Court, the Disciplinary Board shall appoint a chief disciplinary counsel, and a deputy disciplinary counsel. The Disciplinary Board shall appoint such other assistant counsel as may be required for efficient performance of the work and all to serve at the pleasure of the board under its supervision. Subject to the approval of the Supreme Court, the board shall fix the compensation of counsel, if any, and shall promulgate policies for the orderly and efficient conduct of their duties.

B. Powers. Disciplinary counsel shall have the power:

(1) to docket for formal investigation any complaint which sets forth reasonable grounds to believe that a violation of the Rules of Professional Conduct or a violation of these rules has occurred;

(2) to investigate or to refer for investigation to assistant disciplinary counsel or to an investigator, all matters involving alleged misconduct by an attorney subject to the jurisdiction of the Supreme Court when called to his attention by the written complaint of any person. If the complaint is initiated by chief disciplinary counsel, it shall be entitled "chief disciplinary counsel complaint." All investigations shall be reported upon as quickly as reasonably possible unless the Disciplinary Board determines that a stay is necessary to avoid interference with pending civil or

criminal litigation, prejudice to clients or injury to public interest;

(3) to dispose of all matters involving alleged misconduct by an attorney by:

(a) dismissal of the complaint. A dismissal of a complaint that has been docketed for formal investigation is effective only after review and concurrence by a reviewing officer;

(b) letter of caution;

(c) informal admonition. An informal admonition may be made by disciplinary counsel only after review and approval by a reviewing officer; or

(d) the filing of formal charges with the Disciplinary Board;

(4) to prosecute all disciplinary proceedings before hearing committees, the Disciplinary Board and the Supreme Court either in person or through assistant counsel; and

(5) to seek to resolve informally allegations which on their face would not, even if true, involve violations of the Rules of Professional Conduct but which are of concern to the complainant and could easily be corrected by the attorney.

C. **Duties.** Disciplinary counsel shall have the duty:

(1) to receive or initiate in the first instance all complaints, and to maintain docket control, files and records upon any matter upon which an investigation is initiated;

(2) to appear at hearings conducted upon motions for reinstatement by suspended or disbarred attorneys; to cross-examine witnesses testifying in support of the motions and to present any evidence in opposition to reinstatement either in person or through assistant counsel;

(3) to maintain permanent records of all matters processed and the disposition thereof, and to act as the general administrative officer for the Disciplinary Board under its direction and supervision;

(4) to file quarterly status reports with the Disciplinary Board and the Supreme Court indicating the receipt, processing, and status of all complaints. A full explanation shall be orally presented to the board for any matters pending in investigation for over ninety (90) days; and

(5) to keep all complaints and other disciplinary matters confidential except as otherwise provided by these rules.

D. Investigators. The Disciplinary Board may appoint one or more experienced investigators to assist disciplinary counsel in the performance of their duties under these rules. Such investigator shall serve under terms and conditions, and for such period and compensation, as may, from time to time, be specified by the board, and shall be subject to the rules of the board regarding confidentiality of investigations conducted by disciplinary counsel.

E. Private Practice Prohibited. Full time salaried disciplinary counsel or assistant disciplinary

counsel shall not engage in the private practice of law. With prior permission of the Disciplinary Board, full-time salaried disciplinary counsel may speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice.

APPENDIX H

N.M.R.A. RULE 17-301. APPLICABILITY OF RULES; APPLICATION OF RULES OF CIVIL PROCEDURE; SERVICE

A. Application of Rules. This article governs the procedure in disciplinary proceedings before the New Mexico Supreme Court, the Disciplinary Board and its hearing committees and reviewing officers.

B. Application of Rules of Civil Procedure. Except where clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by these rules, the Rules of Civil Procedure for the District Courts of New Mexico shall be used in formal disciplinary proceedings.

C. Service. Except as otherwise provided in these rules, the specification of changes, all pleadings, notices, motions, orders or other papers required to be served may be served on a party unless the party is represented by an attorney in which case service may be upon the attorney. Service upon an attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at the address listed on the most recent registration statement filed under Rule 17-202. Delivering of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of

abode with some person of suitable age and discretion therein. Service by mail is complete upon mailing and shall constitute notice as required by these rules.

D. Proof of Service. Except as otherwise provided in these rules or by order of the Supreme Court or Disciplinary Board, proof of service of any pleading, motion, order or other paper required to be served shall be made by the certificate of the attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the Disciplinary Board or with the Supreme Court, as appropriate, or endorsed on the pleading, motion or other paper required to be served.

E. Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three (3) days shall be added to the prescribed period.

APPENDIX I

N.M.R.A. RULE 17-306. REQUIRED PRESENCE OF ATTORNEY; SUBPOENA POWER

A. **During investigation.**

(1) Disciplinary counsel, at any stage of an investigation after the respondent-attorney has been notified of the investigation, may serve interrogatories on the respondent-attorney. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them. The respondent-attorney shall serve a copy of the answers and objections, if any, to the office of disciplinary counsel within thirty (30) days after service of the interrogatories. The chair of the Disciplinary Board may allow a shorter or longer time in which to file answers upon a motion filed by either the respondent-attorney or disciplinary counsel within ten (10) days of service of the interrogatories on the respondent-attorney. The interrogatory answers may be used by disciplinary counsel at any future hearings in the investigation.

(2) Disciplinary counsel at any stage of an investigation after the respondent attorney has been notified of the investigation, may request or invite the respondent attorney to appear before a reviewing officer and answer questions related to allegations under investigation by disciplinary counsel. The invitation or request shall be accompanied by a statement from

disciplinary counsel describing the allegations being investigated and the areas about which the respondent-attorney will be asked to comment. At an appearance before a reviewing officer, the respondent-attorney has a right to the presence of counsel, the right to make opening and closing statements and the right to introduce documentary evidence. A taped record will be made of the respondent attorney's responses, a copy of which will be provided to the respondent-attorney.

(3) The chair of the Disciplinary Board, at any stage of the investigation after the respondent-attorney has been notified of the investigation, may issue a subpoena for the production of records and other documents of the respondent-attorney or any other witness necessary to the investigation as well as for requiring the presence and testimony of witnesses or the respondent-attorney under oath. The respondent-attorney shall have notice of the subpoena, shall have the right to be present and cross-examine witnesses and shall have the right to be accompanied by counsel.

(4) If it appears that the respondent attorney or a witness may alter, destroy, secrete or remove from the jurisdiction of this state any books, records, documents or other evidence relevant or material to an investigation, at any stage of the investigation, disciplinary counsel, if authorized by the Disciplinary Board may petition the Supreme Court for an order to compel the attendance of witnesses before a hearing

committee and the production before a hearing committee of any books, records, documents or other evidence relevant or material to an investigation before notifying the respondent attorney. The petition shall contain or have attached a sworn written statement of facts showing probable cause to believe that the records may be altered, destroyed, secreted or removed from the State of New Mexico. Any and all proceedings before the Supreme Court pursuant to this subparagraph shall be conducted in camera and shall be kept under the seal of the Supreme Court.

B. **Formal disciplinary proceedings.** At request of either disciplinary counsel or the respondent-attorney, the chair of a hearing committee may issue subpoenas:

(1) requiring the presence of a witness at a deposition for discovery which has been authorized pursuant to Rule 17-311 NMRA and which, if so authorized, may command the witness to produce the designated books, papers, documents or tangible things;

(2) requiring the person to whom the subpoena is directed to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises at a specified time and place. A command to produce evidence or to permit inspection may be joined with a command to appear at a hearing or at deposition, or may be issued separately;

(3) requiring the presence of witnesses at a formal hearing before a hearing committee or the Disciplinary Board;

(4) commanding the person to whom it is directed to produce at a formal hearing before a hearing committee the books, papers, documents or tangible things designated therein.

C. **Contents.** No subpoena shall be issued pursuant to this rule unless it sets forth:

(1) the reason or purpose for the investigation or hearing;

(2) with reasonable definiteness, any records or other documents to be produced which are relevant to the investigation or hearing;

(3) a statement that the witness has a right to be accompanied by counsel; and

(4) the date, time and place at which the witness is to appear.

D. **Enforcement.**

(1) Failure to cooperate with an investigation of the Disciplinary Board, or failure to respond to letters from disciplinary counsel regarding an investigation shall be grounds for submission of a motion to the Supreme Court to order that the offending respondent-attorney be held in contempt of court.

(2) Any person who has been served with a subpoena pursuant to this rule may apply to the officer

issuing the subpoena for an order to quash the subpoena. If any person fails to comply with a subpoena issued by the chair of the Disciplinary Board or the chair of a hearing committee in accordance with the provisions of this rule or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, at the request of the officer issuing the subpoena, disciplinary counsel may apply to the Supreme Court for an order directing that person to take the requisite action. The Supreme Court may issue such order or may quash the subpoena. Should any person willfully fail to comply with an order of the Supreme Court, the court may punish such person for contempt of court.

E. Subpoena; request of another jurisdiction. The chair of the Disciplinary Board, or a member of the board designated by the chair, may issue a subpoena to compel the attendance of witnesses and production of documents in this state for use in lawyer disciplinary or disability proceedings in another jurisdiction. The subpoena may be requested by disciplinary counsel of this state when the request is by the disciplinary authority of the other jurisdiction, or an attorney admitted to practice in this state when the request is by a respondent in a proceeding in another jurisdiction. The person seeking the subpoena shall certify that the subpoena has been approved or authorized under the law or disciplinary rules of the other jurisdiction. Service, enforcement and challenges to a subpoena issued pursuant to this

paragraph shall be in accordance with the Rules Governing Discipline.

[Amended effective Aug. 31, 1995; Jan. 3, 2006.]

APPENDIX J

N.M.R.A. Rule 17-307 INVESTIGATION OF COMPLAINTS

A. Initiation. Chief disciplinary counsel, deputy disciplinary counsel or assistant counsel designated by the chair of the Disciplinary Board shall initiate all investigations, whether upon complaint or otherwise. Investigations shall be conducted by disciplinary counsel staff attorneys or referred to an appropriate assistant counsel or commissioned investigator for report and recommendations. Investigations, examinations and verifications shall be conducted so as to preserve the private confidential nature of the lawyer's records insofar as is consistent with these rules and law.

B. Disposition prior to formal investigation. If the complaint does not set forth allegations which if true state reasonable cause to believe that a respondent-attorney has violated the Rules of Professional Conduct, a disciplinary counsel staff attorney may dismiss the complaint, provided that all doubts shall be resolved in favor of conducting a formal hearing. Within thirty (30) days after receipt of a complaint, if the allegations are serious enough to warrant a formal investigation the office of disciplinary counsel shall notify the respondent-attorney of the nature of the complaint. Upon good cause shown to the Supreme Court, the Court may order the delay in notifying the respondent-attorney of the pending investigation. Upon the request of any person affected by a dismissal, or

sua sponte, the chair of the Disciplinary Board or a board member designated by the chair may, at any time, order further investigation of a complaint that has been dismissed by a disciplinary counsel staff attorney.

C. Procedure of formal investigation. Prior to the filing of a formal specification of charges with the Disciplinary Board the respondent-attorney shall always be advised of the general nature of the allegations and shall be given a fair opportunity to present any matter of fact or mitigation the respondent-attorney wants disciplinary counsel to consider. With the consent of the respondent-attorney, disciplinary counsel may conduct any part of the investigation in the form of an informal hearing allowing parties to present evidence and requiring them to answer questions in compliance with Rule 17-306 NMRA.

D. Investigation report. If disciplinary counsel determines the file should be reviewed by a reviewing officer pursuant to Paragraph B of Rule 17-104 NMRA, disciplinary counsel shall write a brief summary report to include the following:

(1) a summary statement of the facts of the situation with reference to the provisions of the Rules of Professional Conduct or other rule or law claimed to have been violated, and a statement of whether or not disciplinary counsel believes that there is probable cause to believe any violation has occurred;

(2) a statement of the opposing positions of the parties and of the facts disciplinary counsel believes

would find support in the evidence, together with an analysis of the probable result of a hearing in the event formal charges were filed;

(3) recommendations for further handling in accordance with this rule.

E. Review prior to filing formal charges. Any deputy disciplinary counsel or assistant counsel designated by the chair of the Disciplinary Board shall present a draft of the proposed specification of charges to chief disciplinary counsel prior to filing the specification of charges. Chief disciplinary counsel shall either:

(1) approve the filing of the specification of charges; or

(2) recommend an alternate course of action consistent with these rules.

F. Special counsel; special board. If an investigation pursuant to Paragraph A of this rule appears appropriate, whether upon complaint filed or otherwise, relating to disciplinary counsel, a member of a hearing committee, or a member of the board; relating to a spouse, parent, child or sibling of disciplinary counsel or a board member; or relating to a partner or associate of a board member, the matter shall proceed in accordance with these rules except that:

(1) the board shall appoint a special counsel, who shall proceed in accordance with Paragraph B of Rule 17-105 NMRA; and

(2) if the respondent is a member of the board or is a spouse, parent, child or sibling of a board member, the chief justice shall appoint a special board consisting of three members of the bar to hear the case and to report its findings, conclusions and recommendations directly to the Supreme Court.

[Amended effective Oct. 25, 1996; Nov. 30, 2004; Jan. 15, 2007.]

APPENDIX K

N.M.R.A. RULE 17-309. FORMAL CHARGES; DESIGNATION OF HEARING OFFICER OR COMMITTEE

A. Institution of proceedings. Formal disciplinary proceedings shall be instituted by the filing of a specification of charges with the chair of the Disciplinary Board and the issuance by the chair of a formal notice to the respondent-attorney. A copy of the notice, together with a copy of the specification of charges shall be served upon the respondent-attorney.

B. Contents of specification of charges. The specification of charges shall contain:

(1) a brief and plain statement of the charge, or if more than one, each of the separate charges of professional misconduct asserted against the respondent-attorney;

(2) the provisions of the Rules of Professional Conduct, court rule, statute or other law claimed to have been violated;

(3) the names and addresses of all known witnesses against the respondent-attorney;

(4) all known factors in aggravation; and

(5) the name and address of the particular disciplinary counsel who is expected to prosecute the matter. Specification of charges shall be signed by chief disciplinary counsel or by the full-time deputy disciplinary counsel.

C. Designation of hearing officer or committee and notice. Upon filing of the specification of charges, the chair of the Disciplinary Board, or the chair's designee, shall forthwith designate a hearing officer or a hearing committee to hear the matter, and shall mail copies of the specification of charges to the hearing officer or to the members of the committee. The chair shall issue a formal notice to the respondent-attorney which shall advise the respondent-attorney that formal charges of unprofessional conduct have been instituted against the respondent-attorney and referred for hearing to a hearing officer or hearing committee giving the names and addresses of the members thereof and identification of its chair. The notice shall formally advise the respondent-attorney of the following:

(1) the right to file an answer to the specification of charges;

(2) the facts alleged in the specification of charges shall be deemed admitted if not specifically denied by answer or if no answer is filed within the prescribed time, in which event the sole issue to be determined by the hearing officer or committee shall be the nature of the officer's or committee's recommendation of discipline to the Disciplinary Board after consideration of any facts in aggravation or mitigation of the respondent-attorney's fault;

(3) the respondent-attorney has the right to be represented by counsel, to appear at all hearings, to confront and cross-examine the witnesses and to

present relevant evidence in the respondent-attorneys own behalf;

(4) the right to the assistance of subpoenas to be issued at the respondent-attorney's request and to discovery in accordance with these rules; and

(5) within ten (10) days of receipt of notification of the designation of the members of a hearing committee, the respondent-attorney has the right to object to the qualification of the hearing officer or any member of the hearing committee setting forth facts which establish that such member cannot impartially decide the matter. Any objection to the qualification of any member of the hearing committee to sit and deliberate upon the matter must be filed with the committee chair and will be passed upon by members of said committee in the exercise of their sound discretion. Any objection to the qualification of a hearing officer shall be to the chair of the Disciplinary Board. A hearing officer or any member of a hearing committee who feels unable to sit impartially in any disciplinary proceeding may withdraw upon the filing of a notice of recusal stating the reasons for the recusal.

D. Service. Service of the specification of charges and formal notice shall be made upon the respondent-attorney in the manner prescribed by these rules. A copy of any procedural rules adopted by the Supreme Court or Disciplinary Board which have not been published in the NMRA shall be served on the respondent-attorney with the specification of charges.

If service is by mail it shall be by certified mail, return receipt requested, directed to the respondent-attorney's address of record in the office of the clerk of the Supreme Court and shall be complete upon receipt by the respondent-attorney, or five (5) days after service or mailing, whichever is earlier.

[Amended effective Jan. 15, 2007.]

APPENDIX L

N.M.R.A. RULE 17-313. HEARINGS

A. Time for Commencement. Within thirty (30) days after the expiration of time for filing an answer, the chairman of the hearing committee shall set a time and date for a formal hearing on the charges. The formal hearing shall be set no later than one hundred and twenty (120) days from the date of the expiration of time for filing an answer. Upon a showing of good cause, the chairman of the disciplinary board may extend the time for the commencement of the hearing.

B. Notice of Hearings. The chairman of the hearing committee shall give prompt written notice of the time and place of the hearings to the parties.

C. Record of Proceedings. The chairman of the hearing committee shall arrange for the taking of a record of all evidence received during the course of the hearing. The expense for the transcript of proceedings shall be paid for by the Disciplinary Board, but may be assessed against the respondent-attorney in accordance with Paragraph B of Rule 17-106. The record in all disciplinary hearings may be taken on an audio recording device approved by the administrative office of the courts or the chairman of the hearing committee shall arrange for a stenographic record of the proceedings to be prepared. The committee shall cause a copy of the record to be filed with the Disciplinary Board, together with the hearing committee's file of all pleadings and other material submitted to it

and all exhibits. The record of the hearing shall comply with the Rules Governing the Recording of Judicial Proceedings.

D. Procedure of Hearings. Formal hearings will proceed in the following manner:

(1) formal hearings will be adversary in nature, prosecuted by disciplinary counsel and determined by a majority vote of the hearing committee. The chairman of the Disciplinary Board or, in emergencies, the vice chairman of the Disciplinary Board, may designate members of another committee to substitute for any absent or disqualified member, if necessary;

(2) all witnesses shall be sworn;

(3) disciplinary counsel shall present evidence in support of all allegations in the specification of charges, followed by the respondent's evidence;

(4) the committee chairman shall preside and shall make rulings upon questions of admissibility of evidence and conduct of proceedings;

(5) all committee members may ask questions of any witness, including the respondent-attorney, at any stage of the proceedings;

(6) hearings may be adjourned from time to time at the discretion of the chairman of the hearing committee;

(7) the complaining witness or witnesses, the respondent-attorney and disciplinary counsel may be

present throughout the formal hearing. Other witnesses may be excluded, except when testifying, at the discretion of the chairman of the committee; and

(8) within ten (10) days after the conclusion of the hearing or within a time period otherwise agreed to by the parties and the committee, both parties shall have the right to submit proposed findings and conclusions after which the hearing committee shall consider the case and shall, within thirty (30) days after the requested findings and conclusions are submitted, prepare, sign and transmit to the Disciplinary Board its findings of fact, conclusions and recommendations for discipline or other disposition of the matter. Upon the request of the chairman of the hearing committee and upon a showing of good cause, the chairman of the Disciplinary Board may extend the time for preparation and transmission to the Disciplinary Board of the committee's findings of fact, conclusions and recommendations, which request may be made before or after the thirty (30) days, but such extension shall not exceed an additional sixty (60) days without a further showing of good cause.

E. Notice of Findings, Conclusions and Recommendations. Upon the filing in his office of the record of the formal hearing and the findings of fact, conclusions and recommendations of any hearing committee, the chairman of the Disciplinary Board shall give written notice of the filing date thereof with copies of the findings, conclusions and recommendations to chief disciplinary counsel, prosecuting disciplinary counsel, the respondent and counsel for the

respondent. The respondent may request a copy of the record of proceedings directly from the court reporter and at the respondent's own expense. At the same time, the chairman shall advise the parties that they have ten (10) days from the date of mailing of the findings, conclusions and recommendations to request oral argument or permission to submit briefs before the Disciplinary Board if they wish to do so, and shall advise them of the names of the members of the panel of the board that will be designated to consider the matter.

F. Record Defined. As used in these rules, "record" means:

(1) a tape which was recorded by an audio recording device approved by the administrative office of the courts for use in the district courts of this state. Where the transcript of the proceedings is a tape, the chairman of the hearing committee shall cause an index log to be prepared for the tape. The tapes shall not be transcribed for purposes of an appeal;

(2) a statement of facts and proceedings stipulated to by the parties for purposes of review; or

(3) stenographic notes which must be transcribed when a "record" is required to be filed.

APPENDIX M

N.M.R.A. RULE 17-314. CONSIDERATION BY THE DISCIPLINARY BOARD

A. Appointment of Hearing Panel. Upon receipt of the findings of fact, conclusions and recommendations of the hearing committee, the chair of the Disciplinary Board shall appoint one or more members of the board to serve as a hearing panel, with one member designated as chair.

B. Submission of Briefs and Requests for Oral Argument. On written request of a party or a panel member, the chair of the panel may allow oral argument or submission of briefs. Requests for oral argument and for submission of briefs shall be filed with the panel chair within seven (7) days after service of the findings of fact, conclusions and recommendations of the hearing committee and shall state with specificity the issues to be addressed in the proposed argument or brief

C. No Additional Evidence Before the Board. The Disciplinary Board panel shall consider only evidence in the record of the hearing committee. No additional evidence will be admitted at the hearing before the board.

D. Oral Argument. When oral argument is allowed, the party requesting the oral argument shall proceed first, but may reserve a portion of the allotted time for rebuttal. The amount of time for oral argument may be determined by the panel.

E. Proceedings on Remand. If the Supreme Court remands a matter to the Disciplinary Board for evidentiary proceedings pursuant to Paragraph G of Rule 17-206 or Paragraph B of Rule 17-208, the chair shall assign the case to a panel of one or more members of the Disciplinary Board and shall appoint a member of the panel to chair the panel. The panel shall hold a hearing within thirty (30) days of the assignment. Upon a showing of good cause, the chair of the Disciplinary Board may grant an extension of time within which the hearing may be held. The panel shall follow the procedures set forth in Rule 17-313 as if the panel were a hearing committee, except that the panel shall forward the record of the proceedings and its findings and recommendations directly to the Supreme Court.

[Amended effective May 16, 1994; Jan. 1, 1995.]

APPENDIX N

N.M.R.A. RULE 17-316. REVIEW BY THE SUPREME COURT

A. Decisions subject to review. There are three methods for seeking review by the Supreme Court of a recommendation or decision of the Disciplinary Board entered pursuant to Rule 17-315 NMRA:

(1) if the decision recommends public censure by the Supreme Court, suspension, disbarment, reinstatement after suspension or disbarment or denial of reinstatement after suspension or disbarment, a respondent-attorney or disciplinary counsel may request a hearing before the Supreme Court by filing a request for hearing with the clerk of the Supreme Court within fifteen (15) days of service of the decision and recommendations of the Disciplinary Board on the party requesting the hearing which the court, in its discretion, may grant,

(2) if the decision of the board is to assess costs, to impose a formal public reprimand by the board or to impose or terminate probation, within fifteen (15) days of service of the decision, the respondent-attorney or disciplinary counsel may petition the Supreme Court for a hearing, which the Court, in its discretion, may grant. The petition must allege one of the following:

(a) the decision of the Disciplinary Board is in conflict with a decision of the Supreme Court;

(b) a significant question of law is involved;

(c) there is no substantial evidence in the record to support a material finding of fact upon which the decision of the Disciplinary Board is based; or

(d) the petition involves an issue of substantial public interest that should be determined by the Supreme Court; or

(3) if the decision of the board is to dismiss the charges, within fifteen (15) days of service of the decision, the respondent-attorney or disciplinary counsel may petition the Supreme Court for a hearing, which the Court, in its discretion, may grant. The petition must allege one or more of the following:

(a) the decision of the Disciplinary Board is in conflict with a decision of the Supreme Court;

(b) a significant question of law is involved;

(c) there is no substantial evidence in the record to support a material finding of fact upon which the decision of the Disciplinary Board is based; or

(d) the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. Procedure. If a hearing is held in accordance with this rule, the clerk of the Supreme Court shall notify the respondent-attorney and disciplinary counsel of the time and place of the hearing. Proper notice shall be presumed by mailing to the address on file in the Supreme Court office. Briefs shall be submitted only if requested by the Supreme Court. In this event, the clerk of the court will advise the

parties of dates when their respective briefs must be submitted and the issues which are to be addressed. The form of any such briefs shall be that which is prescribed by the Rules of Appellate Procedure.

C. Failure to request a hearing. If, within fifteen (15) days from the date that the recommendations of the Disciplinary Board are served, a respondent-attorney or disciplinary counsel has not requested or petitioned for a hearing with the Supreme Court in accordance with this rule, and:

(1) the recommendation is for public censure by the Supreme Court, suspension or disbarment, the Supreme Court may issue a mandate accepting the recommendations of the Disciplinary Board or it may take such other action as it deems appropriate;

(2) the decision is to impose a formal reprimand by the Disciplinary Board or probation, the Disciplinary Board may publish the public reprimand or place the attorney on probation in accordance with its decision.

D. Supreme Court decision. The Supreme Court, in its discretion and under such conditions as it may specify, may:

(1) reject any or all of the findings, conclusions or recommendations of the Disciplinary Board;

(2) accept any or all of the findings and conclusions of the board;

(3) impose the discipline recommended by the board or any other greater or lesser discipline that it deems

appropriate under the circumstances including disbarment; or

(4) impose probation or other conditions as a type of discipline by itself or may defer the effect of the discipline imposed.

[Amended effective April 12, 2001; Jan. 15, 2007.]

APPENDIX O

Tx. R. Disc. A. Bd. Intl. Rule 1.03 Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the Texas Rules of Civil Procedure ("TRCP"), Texas Rules of Appellate Procedure ("TRAP"), and Texas Rules of Evidence ("TRE") apply to all disciplinary matters before BODA, except appeals from classification decisions, which are governed by Section 3 of these Internal Rules.

APPENDIX P

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of
STUART STEIN, ESQ.

An Attorney Licensed to
Practice Before the Courts of
the State of New Mexico

Disciplinary No.
02-2006-505

ORDER DENYING REQUEST FOR DISCOVERY

THIS MATTER having come before the Chair of the Hearing Committee, appointed by the Chairman of the Disciplinary Board pursuant to Rule 12-312(A) of the Rules Governing Discipline on Respondent's Request for Discovery filed pursuant to Rule 17-311 of the Rules Governing Discipline, and the Hearing Committee Chair having considered the Request and being otherwise fully advised in the premises,

FINDS that Respondent has failed to demonstrate and establish sufficient need to conduct discovery proceedings prior to the date set for formal hearing.

IT IS THEREFORE ORDERED that Respondent's Request for Discovery should be, and hereby is, denied.

DATED: October 12, 2006

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee Chair

to the following:

Joel L. Widman
Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
Albuquerque, NM 87103-1809

Stuart Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.

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APPENDIX Q

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

OBJECTIONS OF DISCIPLINARY COUNSEL TO RESPONDENT'S SECOND REQUEST FOR DISCOVERY

Respondent's "second" request for discovery is, in reality, his fifth request for discovery, the four prior requests having been denied by the hearing committee. The same arguments now being made, namely, that respondent does not understand the Specification of Charges and needs information to connect his conduct with the violations of Rules of Professional Conduct and that he needs to depose the named witnesses to find out what their testimony will be have been made in one form or another in respondent's Alternate Motion To Dismiss filed on May 1, 2006 and subsequently denied; respondent's Motion To Continue and Request For Discovery both of which were filed on July 3, 2006 and both of which were denied and respondent's Motion To Recess made on August 28, 2006 which was also denied. The Second Request is merely a rehash of prior arguments made

by respondent and rejected. Moreover, one would be hard put to find a pleading filed by respondent that did not contain a request to delay, recess or continue the hearing of this matter. Respondent's Second Request is no exception.

It is significant that this matter was pending for almost five months before respondent filed his Request For Discovery on July 3, 2006 and then only after a hearing date was set. It is also significant that the Request For Discovery was accompanied by a Motion To Continue. If respondent's professed need for the information he now purportedly seeks was legitimate, he certainly would have proceeded expeditiously to seek discovery instead of waiting until a continuance of the hearing would be required to accommodate his requests unless, of course, a continuance was the purpose of the discovery request in the first place. When one views the procedural history of this matter, respondent's claim that the Chair "rushed the Respondent to the hearing on the merits on August 28, 2006," fully six months after the Specification of Charges were filed, is ridiculous. Respondent's real purpose here is not to obtain discovery but to delay these proceedings.

Respondent would do well to re-examine his prior Request For Discovery before accusing disciplinary counsel of lying to the hearing committee regarding respondent's prior discovery attempts. The fact is that respondent never requested permission to depose Mr. MacKenzie. Respondent's generic request was and is for permission to depose "all witnesses" to "find out

what their testimony will be at the final hearing, to explain inconsistencies with any of the positions previously taken based on the other discovery materials then produced and any other matters pertinent to the veracity of their expected testimony," in other words, the broadest kind of fishing expedition. No particularized need was or is shown to take Mr. MacKenzie's deposition or, for that matter, the deposition of anyone else.

Respondent's proposed Request To Produce is moot. Respondent has already been furnished with disciplinary counsel's exhibits as well as all documents responsive to respondent's subpoena.

Respondent [sic] assertion is [sic] support of his proposed Requests For Admissions and Interrogatories, that he needs to identify what actions on his part violates the Rules of Professional Conduct, have similarly been made and rejected. Unlike document discovery, Rules 1-033 and 1-036 of the Rules of Procedure for District Courts, restrict interrogatories and requests for admissions to parties. Disciplinary counsel is not a "party" to disciplinary proceedings any more than a district attorney is a party to criminal proceedings and the service of interrogatories and requests for admissions on disciplinary counsel is improper.

Moreover, the service of interrogatories and requests for admissions on disciplinary counsel is simply an attempt by respondent to secure the testimony of disciplinary counsel by indirect means. This issue has been previously dealt with (as have all of

the issues now raised by respondent) by the hearing committee in granting the Motions To Quash the subpoenas served by respondent on disciplinary counsel.

In *Stuart L. Stein, Esq. v. Robert P. Tinnin, Jr., Esq., et. al.* No. 29, 927, the New Mexico Supreme Court in an Order dated August 23, 2006 summarily denied respondent's Petition For Extraordinary Writ in which he alleged, inter-alia, that a complete denial of discovery in a disciplinary case is a denial of federal and state due process. In short, respondent's discovery contentions have not only been rejected numerous times by the hearing committee in this matter but by the Supreme Court as well. For the reasons stated herein, they should be rejected once again.

Respectfully submitted,

/s/ Joel L. Widman

Joel L. Widman
Deputy Disciplinary Counsel
P.O. Box 1809
Albuquerque, NM 87103-1809
505-842-5781

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2006, I served the enclosed Objections of Disciplinary Counsel To Respondent's Second Motion In Limine, etc and Objections of Disciplinary Counsel To respondent's Second Request For Discovery by United States First Class Mail Postage prepaid and addressed to:

Robert P. Tinnin, Jr. Esq.
Hearing Committee Chair
500 Marquette, NW Ste 1300
Albuquerque, NM 87102-5318

John P. Eastham, Esq.
2201 San Pedro, NE Bldg. 2
Suite 207
Albuquerque, NM 87110

Ms. Carolyn Tinker
1801 Camino Raso, NW
Albuquerque, NM 87107

Stuart L. Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Joel L. Widman
Joel L. Widman, Deputy
Disciplinary Counsel

APPENDIX R

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 02-2006-505

IN RE:

STUART L. STEIN, ESQ.,

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent.

_____/

SECOND REQUEST FOR DISCOVERY

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and under the authority of Rule 17-311 of the Rules Governing Discipline seeks permission from the chairman of the hearing committee, for a second time, to conduct the following discovery:

INTRODUCTION

The Chair previously denied all discovery in this matter and rushed the Respondent to the hearing on the merits on August 28, 2006. After three days of motions and testimony, it is clear that Deputy Disciplinary Counsel did not professionally and adequately investigate or prosecute this case. Should Respondent only have had his Due Process rights allowed with

adequate discovery, this cause could have been determined on motions for summary judgment or on other dispositive motions.

The misleading and unethical actions of Mr. Widman in denying matters concerning the confidentiality of the materials he has received from Judge Vanzi, Mr. MacKenzie and others is already self evident. During the testimony of Mr. MacKenzie, when the undersigned was attempting to get information from the witness the following took place:

> MR. WIDMAN: Well, you know, I think what he's trying to do is conduct discovery in the course of this hearing, I don't think that's proper. ***He's never tried to take his deposition. He never tried to legitimately take any discovery with respect to Mr. MacKenzie.***

Transcript, pg. 500, line 15 to 21, emphasis supplied. This italicized statement is an absolute lie. If there is anything clear on the face of this record from the very beginning of this case is the fact that the undersigned has demanded his Due Process rights to discovery. Mr. Widman's position on the record is clear: he has claimed no discovery is needed and the Chair has agreed and refused to allow any discovery.

The information revealed since the start of the hearing on the merits, including the materials supplied this last week, is proof positive of Mr. Widman's abuse of the system and failure of his duty of candor to this tribunal. The only remedy is to now allow full

discovery prior to the re-setting of the hearing on the merits. Discovery must be granted to level the playing field. Therefore, Respondent again asks that the Chair allow the following discovery, as was effectively previously first requested and denied:

I - REQUESTS TO PRODUCE

Showing of Need. Respondent needs to see all materials obtained by disciplinary counsel from third parties in their investigation to discover what will be introduced at the final hearing, what will not be produced at final hearing and written statements of witnesses that may have been obtained. The initial complaining witnesses, Judge Linda Vanzi, has not been listed as a witness by disciplinary counsel. Judge Vanzi may have provided materials to disciplinary counsel that were not forwarded with her initial complaint. Further, four witnesses listed in the Specification of Charges are attorneys. Production of what such attorneys provided to disciplinary counsel may have bearing on the question of any attorney-client privilege with their respective clients and the selective disclosure to prejudice the matter against Respondent. Without having these materials for review prior to deposition of the witnesses, complete preparation for the final hearing will be fatally flawed. This can only be done with a Request for Production directed to Petitioner and responded to by disciplinary counsel. Disciplinary counsel failed to respond to a June 22, 2006 letter from Respondent to obtain this material. See, Exhibit A, attached hereto.

Additionally, without knowing what is in the hands of Petitioner, Respondent is not in a position to know what not to request from the other witnesses upon their deposition(s) to avoid them producing the same materials.

II - REQUESTS FOR ADMISSIONS

Showing of Need. Respondent needs to narrow and clarify the issues concerning the specific violations of the Rules of Professional Conduct raised in the Specification of Charges. Since paragraph 3 of the Specification of Charges lists violations of the Rules of Professional Conduct different from those listed in paragraph 48 of the Specification of Charges and since this hearing committee has refused to allow the Motion to Dismiss partially based on this inherent inconsistent position, the only way Respondent can identify what violations Petitioner, through disciplinary counsel, intends to prove, amongst other issues, is by responses to Request for Admissions.

III - INTERROGATORIES

Showing of Need. Respondent needs to pin down under oath what actions taken on his part are considered by disciplinary counsel violations of the particular Rules of Professional Conduct. Without knowing what facts sought to be proved violate which Rules of Professional Conduct, Respondent is moving towards the final hearing blind. This can only be done with

interrogatories propounded to Petitioner and responded to by disciplinary counsel.

IV – DEPOSITIONS

Showing of Need. Once the above requested discovery is obtained, depositions of all witnesses, including the complaining party, will be required to find out (1) what their testimony will be at the final hearing, (2) to explain inconsistencies with any of the positions previously taken based on the other discovery materials then produced and (3) any other matters pertinent to the veracity of their expected testimony. Further, since some witnesses are out of state, it may be impossible to have them appear at trial without unnecessary expense. Should their depositions be taken, their potential telephone testimony will be better able to be comprehended by this hearing committee and a better record will be had for review, should that be necessary. Further, because of the number of witnesses, the trial date may not find that all these witnesses are available for live testimony and their depositions will have to be read into the record for the hearing committee to consider.

WHEREFORE, Respondent prays that all the requested discovery should be GRANTED.

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite

207, Albuquerque, NM 87110, Ms. Carolyn Tinker, 1801 Camino Raso, N.W., Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq., Deputy Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this September 13, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

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APPENDIX S

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of
STUART L. STEIN, ESQ.
An Attorney Licensed to
Practice Before the Courts
of the State of New Mexico

Disciplinary No.
02-2006-505

ORDER DENYING REQUEST FOR DISCOVERY AND MOTION TO CONTINUE AND RE-SET FINAL/FORMAL HEARING

This matter having come before the Hearing Committee appointed by the Chairman of the Disciplinary Board pursuant to Rule 17-312(A) of the Rules Governing Discipline on Respondent's Request for Discovery and his related Motion to Continue and Re-Set Final/Formal Hearing, and the Hearing Committee having considered the pleadings and being otherwise fully advised in the premises,

FINDS

1. Respondent has failed to demonstrate and establish sufficient need to conduct discovery proceedings prior to the date set for formal hearing as required by Rule 17-311 of the Rules Governing Discipline and said request should be denied.

2. Respondent's Motion to Continue and Re-Set Final/Formal Hearing is grounded on his alleged need

to conduct discovery prior to the hearing and should also be denied.

IT IS THEREFORE ORDERED that Respondent's Request for Discovery and his Motion to Continue and Re-Set Final/Formal Hearing should be and hereby are denied.

Dated this 4th day of August, 2006.

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee
Chair for the Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2006, I mailed the foregoing Order to the following:

Joel L. Widman
Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
Albuquerque, NM 87103-1809

Stuart Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Robert P. Tinnin, Jr.

APPENDIX T

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 02-2006-505

IN RE:

STUART L. STEIN, ESQ.,

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent.

_____/

REPLY TO DISCIPLINARY COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S REQUEST FOR HEARING, DISCOVERY AND TO CONTINUE

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and in Reply to the July 14, 2006 Memorandum in Opposition to Respondent's Request for Hearing, Discovery and to Continue the final hearing set for August 28, 2006 states as follows:

1 – INTRODUCTION

At this point, the hearing committee experience from the abbreviated formal hearing in Disciplinary No. 03-2006-507 on July 18, 2006: the Anaya case, is instructive. Respondent will recap the examination of Mrs. Jonas and then go on to proffer the evidence

that would have been adduced concerning the actions of the office of Disciplinary Counsel in the Anaya case that, in the light most favorable to that office was questionable and in the light most favorable to the Respondent, outrageous unethical behavior. Respondent asks that the chair and this hearing committee understand that liberal discovery would have allowed disclosure of important information which would have either lead to the voluntary dismissal of the Anaya case by reasonable discipline counsel or the dismissal of the case by this hearing committee upon motion by Respondent after discovery would have supported his points.

A. Examination of Mrs. Jonas

The testimony of the main witness, Mrs. Jonas, would be described by Shakespeare as being full of sound and fury, signifying nothing: she was unable to remember any conversations or statements of Respondent supporting allegations in the Specification of Charges. She was shown to have given one statement under oath on a the simple fact of a telephone call to her mother before this hearing committee and an entirely different statement when she swore before a notary and signed the civil complaint against Respondent.

Mrs. Jonas admitted that the advertising flyer she saw and studied concerning the seminar she and her husband attended concerned long term care in a nursing home paid for by Medicaid. She further

admitted that the seminar was two hours in length and what was discussed was long term care in a nursing home paid for by Medicaid. She also admitted that the only issue discussed when she and her mother came to Respondent's office was long term care in a nursing home paid for by Medicaid. Then, incredulously, she testified that neither she nor her mother ever wanted Mr. Anaya to be cared for in a nursing home for long term care. This was the only part of the testimony that sounded truthful. This turned the entire case around. When Mrs. Anaya was questioned concerning the distinction made at the seminar by Respondent between long term care in a nursing home paid for by Medicaid and the Disabled and Elderly (or "D & E") Waiver she feigned forgetfulness and claimed that she was not good at details.

What bottomed the Maya case was not an ethical violation. It was a law school contract case about the failure to have a "meeting of the minds" of the two parties to the legal services agreement: Mrs. Anaya/ Mrs. Jonas and Respondent. Mrs. Jonas and her mother paid the fee subjectively thinking they were getting advice on the D & E Wavier program for part time help at home under Medicaid and Respondent provided advice on long term nursing home care under Medicaid that he spoke about at the seminar and at the consultation. Mrs. Jonas was confused and never correctly communicated her and her mother's desires for Mr. Anaya's care needs correctly to Respondent. Mrs. Jonas testified at least three times

that she never conveyed to Respondent that she did not want her father in a nursing home.

Finally understanding the position of Mrs. Jonas and her mother, Respondent was stunned. Respondents' original thought concerning the reason for the refund evaporated: the client could get the same advice concerning long term nursing home care for free so they wanted their money back. Respondent instantly felt sympathy for a confused woman oppressed with the burden of taking care of her then debilitated father and an increasingly dependent mother. Mrs. Jonas and her mother deserved a refund of the fee. That was the essence of the discussion in the hall between Respondent and disciplinary counsel: Mrs. Jonas should not have to suffer further on the stand. She was entitled to a refund. Disciplinary counsel insisted on an informal admonition. Respondent agreed to the mild sanction bringing the matter to a quick conclusion and end what was turning into a painful cross examination of Mrs. Jonas for the purpose of accomplishing the right thing: refund of the fee.

B. Actions of the Office of Disciplinary Counsel.

The actions of one or more members of Disciplinary Counsel in the investigative stage of the Anaya case was despicable. When the fee dispute complaint was made by Mr. and Mrs. Jonas and Mrs. Anaya to the disciplinary board it was forwarded to the

Respondent. Respondent suggested that the matter could be resolved by submitting the dispute to the fee arbitration service offered by the State Bar of New Mexico. Discipline counsel agreed to hold off any further investigation pending the resolution of the arbitration.

As soon as disciplinary counsel was informed that the fee dispute matter was going to binding arbitration, the office geared up to illegally and unethically interfere with the process. All of the egregious acts of the office of disciplinary counsel were outlined in federal court in a February 13, 2006 Motion and Memorandum and a February 21, 2006 Addendum to the Motion and Memorandum filed with the United States District Court for the District of New Mexico in case number CIV 04-0840 JB/DJS. See, Exhibits 1 and 2, attached hereto.[1]

As the exhibits irrefutable [sic] prove, Mr. Widman and/or someone from his office, disclosed confidential materials in this file prior to the filing of a Specification of Charges, thus violating the confidential nature of the proceedings under Rule 17-304 by discussing the matter with the Arbitrator prior to the hearing on the arbitration. Mr. Widman continued to have secret contact with the arbitrator and

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[1] Although the federal court denied the relief of leave to file an amended complaint because of technical reasons, the facts supporting the cause of action speak for themselves concerning the actions of disciplinary counsel.

obtained the arbitration decision prior to it being circulated to the Respondent and the complaints' [sic] attorney. These contacts were never disclosed when they happened and were not disclosed by the arbitrator, making the arbitration award void under New Mexico law. See, N.M.S.A. § 44-7A-13(b). The attorney for Mrs. Anaya agreed and requested the district judge to set aside the arbitration award.

Yet, Mr. Widman, having actual or constructive knowledge that the arbitration award was to be set aside, did nothing to withdraw all allegations in the Specification of Charges that made reference to the arbitration award. Yet, he and/or his office was responsible for the time, effort and monies expended for the arbitration to have been for naught.

As stated in the federal papers, the actions of the office of disciplinary counsel in the Anaya case has been illegal, unethical and corrupt. Such infamous conduct would be of significant import for mitigation of any imposed sanctions, should there have even been a finding of a violation in the Anaya case.

C – Impact of Denial of Discovery.

In the Anaya case, this hearing committee denied a continuance of the final hearing and all requested discovery. It was Mr. Widman who demanded that a final hearing date be set prior to the ruling on the Motion to Dismiss. This hearing committee set the final hearing in Anaya and this instant case prior to the 15 days allowed for a Response by the undersigned on the setting request. The rules require that

the final hearing be set no later than 120 days from the time an Answer is due. Pursuant to the Order entered by this hearing committee on June 22, 2006, the Answer was required to be filed on June 30, 2006.[2] That being the case, the Rules Governing Discipline then required the final hearing to be set no later than 120 days after June 30, 2006. Rule 17-313.A. This brings us to Monday, October 30, 2006 since the 120th day comes on the weekend before this date.

In the Anaya case, this hearing committee rushed Respondent to final hearing 18 days after the Answer was due without any discovery what-so-ever. Although the final result of the Anaya case was fair and just, putting aside the admonition, it was not a complete exoneration that Respondent should have experienced because of the complete absence of discovery.

This hearing committee must keep in mind that all the pre-filing fact finding, interview of witnesses, accumulation of documentary evidence and other materials accomplished by disciplinary counsel was done without notice to Respondent. Admittedly, notice to Respondent is not required under the rules. This denies Respondent any right to object to such discovery. Yet, the Rules require the Respondent to request and show need for discovery once a Specification of

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[2] The actual Answer was served on July 3, 2006 – the Monday following the June 30, 2006 date.

Charges are filed. Rule 17-311. This is inherently unfair and constitutionally infirm.

C. [sic] Inability to Prove Inherent Unfairness of Attorney Disciplinary System.

This hearing committee has stricken the counterclaim which would have given the ability to Respondent to prove the inherent unfairness of the entire attorney disciplinary system. Although Respondent accepts this ruling, this hearing committee must take notice that disciplinary counsel has all the discovery tools to obtain everything they need to prove their case at a final hearing prior to filing a Specification of Charges. If they did not, the filing of the Specification of Charges, itself, is an unethical act. See, Rule 16-308, Rules of Professional Conduct.

It is only by being conscience [sic] of the past actions of the office of disciplinary counsel, outlined above, that the chair and this hearing committee can make an informed decision on the discovery and continuance requests of Respondent.

II – REQUEST FOR HEARING

Disciplinary counsel does not want a hearing. This is no surprise. Without a hearing, members of this hearing committee are denied the opportunity to question him on his past actions and why he believes Respondent should not have to provide any discovery whatsoever. The experience of this Respondent is that

the office of disciplinary counsel by omission or commission goes out of its way to mislead and secret information. Without oral argument to pin them down, one never gets a straight answer. Interference in the search for the truth was evident at the Anaya hearing. When asked for proof that Chief Disciplinary Counsel reviewed and approved the Specification of Charges, Mr. Widman admitted that he has no proof, although Virginia L. Ferrara, Chief Disciplinary Counsel, stated under oath at deposition the following:

A . . . I don't know what it's called, just [a] one page thing that I sign, and it says, on this date I reviewed the charges and approved them for filing or disapproved them or approved them with modification – check, check, check.

Q Okay

A And the date.

Q And that's on the inside of the file itself, or is that kept in a separate place?

A It's in the working file.

Q All right. The working file that is held by the discipline counsel in charge of prosecuting the case?

A Yes.

Q And is this just a one-page item that you sign that just concerns this review prior to filing?

A Yes.

See, Exhibit 3, Page 22, line 6 and following. Although this was raised in the Motion to Dismiss that was denied by this hearing committee, we only found out the truth at the final hearing when Respondent demanded to see this sign-off sheet and Mr. Widman admitted it does not exist when Respondent asked the Chair to require that it be brought in after the lunch break. Mr. Widman never addressed this point in his June 6, 2006 late response to the Motion to Dismiss. This is just another instance of the office of disciplinary counsel misleading by omission when the Rules of Profession Responsibility requires candor. See, Rule 16-303 and 16-304. Disciplinary counsel has been doing this for so many years that their ethical compass could not find true north concerning their own actions if they tried.

Because of the duplicitous past actions of disciplinary counsel, a hearing on every motion should be mandatory to assure that the chair and this hearing committee can ascertaining [sic] that it is being presented with the whole truth.

A hearing will allow both parties to discuss and agree on – or the chair or the committee will rule on – the logistics of the discovery, such as to setting dates and times [sic] periods.

This hearing committee should grant a hearing on the discovery and continuance request to assure fairness and Due Process.

III – RESPONDENT HAS DEMONSTRATED NEED

Putting aside the underlying unfairness that Petitioner did all their discovery and were ready for the final hearing at the time they filed the Specification of Charges and seeks to deny Respondent similar discovery after the filing of charges, Petitioner's position to deny all requested discovery is based on six points: (1) Respondent served his Answer to the Specification of Charges; (2) Respondent should have been served his discovery request on March 20, 2006; (3) requesting materials obtained by discipline counsel wouldn't inform Respondent what will be introduced at the hearing; (4) requests for admissions and interrogatories can't pin down what actions of Respondent violated what charged Rule of Professional Conduct; (5) that depositions won't give Respondent information on what a deposed witness will state at trial under oath and, lastly, (6) that all the discovery requested is only for the purpose of harassment and delay. Each transparent objection will be easily traversed so the chair and this hearing committee can grant the discovery and continuance.

(1) Filing of an Answer Does Not Negate Necessity of Discovery.

This is a false objection. Once a Motion to Dismiss is denied, an Answer needs to be served. Pleadings in civil, criminal and administrative actions allow the parties to determine what they need to prove or refute at a final hearing. Since the hearing

committee saw fit not to dismiss the Specification of Charges or require a more definite statement, discovery is used to crystalize the position of the opposite party. Discipline counsel attempts to snooker the chair and this hearing committee with sophomoric reasoning to deny all discovery: it is intellectually dishonest and is not persuasive. Filing an Answer does not negate the requirement for adequate discovery.

(2) Discovery Request Was Timely.

In light of the proven historical lack of candor of disciplinary counsel, it would be foolish for any Respondent to ask for discovery prior to a ruling on a Motion to Dismiss. The Specification of Charges in this matter was an object lesson of poor draftsmanship and a complete absence of effective editing. For instance, there is no separation of specific claimed violations of the Rules of Professional Responsibility into separate Counts – basic pleading practice. And there are no paragraphs 14 to 32. Based on those points, alone, Respondent expected that the Motion to Dismiss would have been granted. It wasn't. If it was, any discovery requested in March directed to a potentially dismissed Specification of Charges would be worthless and a second round of discovery would have been required. The request was made the same day the Answer was served. This objection to discovery by disciplinary counsel is also without merit.

(3) Request for Production is Valid and Important.

In a unprofessional and transparent word game disciplinary counsel claims that production of all the materials he has obtained would not inform Respondent what will be introduced by him at trial. That's not the point. Clearly, some of the materials he has obtained will be introduced in evidence. This will be found out in the discovery process. But there may be materials that Mr. Widman does *not* plan to introduce for it may tend to prove that the Respondent has not violated a claimed Rule of Professional Responsibility. Respondent is entitled to see, inspect and copy these papers.

Disciplinary Counsel wants Respondent to first see any exhibits at the final hearing. If there is a clearer violation of the Due Process rights of Respondent to be on notice as to what will happen at the final hearing, it is difficult to conceptualize.

The Requests for Production should be allowed.

(4) Requests for Admissions and Interrogatories are Vital for Defense.

Since disciplinary counsel did not divide his Specification of Charges into specific counts concerning specific violations of the Rules of Professional Conduct, only written Requests for Admissions and Interrogatories can pin down what actions or inactions of Respondent amounted to violations. That, on its face, is a showing of need. Further, it is unknown

if the attorneys listed as witnesses will be fact or expert witnesses. Since there is no cooperation, professional or otherwise, between the offices of the parties, this can only be discovered by written discovery.

Disciplinary counsel claims there is no provision in the Rules Governing Discipline or the Rules of Civil Procedure that requests for admission can be directed to opposing counsel. Although that statement is correct on its face, disciplinary counsel once again misleads the chair and this hearing committee. Discovery is directed to the opposing party. The opposing party is the Disciplinary Board. The Disciplinary Board acts through disciplinary counsel. Disciplinary counsel files the Specification of Charges. Discovery is sent to counsel for the other side. That's Mr. Widman. If he doesn't want to be the person who signs the interrogatories, he can get Virginia L. Ferrara as Chief Disciplinary Counsel or Sasha Siemel as Chair of the Disciplinary Board to do so. This is not a valid objection to discovery, it's just silliness.

Written Request for Admission and Interrogatories should be allowed.

(5) Depositions are Necessary and Vital to Any Defense.

Clearly, a deposition is a discovery tool that allows an attorney the right to question a person who will be a witness at the trial to find out what they

know, what they discussed with opposite counsel or their investigators and what they may testify to at trial. With this completed, one can certainly understand what their testimony could be at the final hearing. That is the goal. A deponent may change their position from a deposition to the final hearing. One never knows what another will testify to at a final hearing until that time comes. This nonsensical argument made by disciplinary counsel should be dismissed out of hand.

Disciplinary counsel claims that Respondent doesn't need depositions of Petitioner's witnesses because Respondent is well aware of their involvement in the proceedings that gave rise to the charges. He's right. They have lied to courts, mislead this office and the clients of this office. Their actions must be pinned down under oath on deposition. Once this is done and their testimony adduced at final hearing, it will be two members of this hearing panel and this writer along with Mr. Widman who will be compelled under Rule 16-803 to report the ethical lapses of one or more of Mr. Widman's witnesses.

Depositions of all witnesses are required and should be allowed.

(6) Discovery is Required and Not Requested for Harassment or Delay.

Initially, disciplinary counsel has not announced what sanctions he will seek if he proves up any of the charges. Therefore, disbarment is possible. To deny

any discovery when the punishment can be so severe is a clear violation of Due Process. Mr. Widman writes:

> Respondent ignores the fact that the conduct that is the subject of the Specification of Charges is essentially undisputed and is a matter of record.

Memorandum in Opposition, pg. 3. Well, let's skip the final hearing, set the date for the hanging and order up a picnic. Further, if that was true, Mr. Widman doesn't need any witnesses. All he needs to do is introduce the transcripts and materials he doesn't want Respondent to see. If he would withdraw all his witnesses, Respondent will have no reason to depose them. On the other hand, even if the conduct of Respondent is undisputed, it is the impact and interpretation of those acts that become matters of fact and law upon which this hearing committee needs to pass.

This hearing committee should note that Mr. Widman states that Judge Linda Vanzi initiated this compliant [sic]. Id., pg. 4. Yet, Judge Vanzi is not listed as a witnesses [sic] in the Specification of Charges. Respondent had to list her as an adverse witness. It is incredible that disciplinary counsel claims that a Respondent can't take the deposition of the complaining witness who brought the alleged violations of the Rules of Professional Responsibility to the attention of his office.

Lastly, if discipline counsel believes that any discovery tool is being incorrectly used, he has the right to object to same and ask for a protective order or sanctions from this hearing committee. *In Re Chavez,* 2000-NMSC-015 ¶ 34, 129 N.M. 35, 44, 1 P.3d 417, 426.

IV - MOTION TO CONTINUE IS WELL FOUNDED AND SHOULD BE GRANTED

Disciplinary counsel had from September 22, 2005 when it got the complaint from Judge Vanzi until February 22, 2006 – five (5) months! – to investigate and file the Specification of Charges. The Rules Governing Discipline allow 120 days from the service of an Answer to the final hearing. This gives Respondent significantly less time that the investigation process to complete discovery and get ready for trial if the matter is continued until October 30, 2006. A continuance to October 30, 2006 should be granted.

WHEREFORE, the Request for Discovery and the Request for Continuance should be granted in their entirety.

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite 207, Albuquerque, NM 87110, Ms. Carolyn Tinker, 1801 Camino Raso, N.W., Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq.,

Deputy Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this July 22, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

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APPENDIX U

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

DISCIPLINARY COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S REQUEST FOR HEARING ON PENDING MOTIONS, REQUEST FOR DISCOVERY AND MOTION TO CONTINUE

I. Introduction

The most recent flurry of ill-conceived and baseless pleadings filed by Stein is yet another attempt to delay this matter and to thereby avoid taking responsibility for his conduct as described in the Specification of Charges filed in this matter. Moreover, as will be shown hereinafter, respondent's pleadings are a rehash of either previously filed motions in this case or a restatement of positions taken and rejected in other matters.

II.
Respondent's Request For Hearing On Pending Motions Has Already Been Rejected

The instant Request For Hearing is identical in all respects to the Request For Hearing filed by respondent on June 20, 2006 and denied by the hearing committee on June 22, 2006. No additional reason is advanced by respondent as to why oral argument should be allowed with respect to the pending Motions.. The Request For Hearing on Pending Motions should, therefore, be denied.

III.
Respondent Has Failed To Demonstrate Legitimate Need For Discovery

A recurring theme in the pleadings filed by respondent is his inability to identify what violations disciplinary counsel intends to prove unless the hearing committee grants respondent's request *du jour* whether it be dismissal of the charges, a more definite statement or now, leave to file requests for admissions, requests to produce, interrogatories and to take depositions. Nevertheless, respondent's request is wholly conclusory and is devoid of any facts on which this Committee could conclude that a need for discovery actually exists.

In respondent's Alternative Motion To Dismiss/ Motion For More Definite Statement, respondent argued in paragraphs 3 and 4 that the charges lacked the specificity desired by respondent and without

such specificity "it is impossible for respondent to responsively plead to the allegations or to know how to prepare for final hearing on the charges." This argument was rejected by the committee in its Order of June 26, 2006 as being without merit. The correctness of the committee's ruling is demonstrated by the fact that once respondent's Alternate Motions To Dismiss were denied, he filed an Answer to the charges without apparent difficulty.

Moreover, Stein was served filed [sic] a Challenge To the Appointed Panel on March 20, 2006. If there was in fact a good faith need for discovery, respondent would have filed discovery requests at that time instead of wasting everyone's time with groundless motions and then waiting until the eve of the hearing to claim a supposed inability to prepare without the requested information.

The basis for Stein's supposed need for a request to produce is that discovery of all materials obtained by disciplinary counsel will inform respondent as to what materials disciplinary counsel will introduce at the hearing. The logical disconnect here is obvious. Reviewing all the documents obtained by disciplinary counsel will not in any way serve to identify which, if any, documents will be used at trial.

The purported showing of need for requests for admissions and interrogatories is similarly absurd. The purported basis for this showing, namely, that respondent cannot identify the charges has, as pointed out above, been made and rejected. Disciplinary

counsel does suggest, however, that respondent may want to re-read the Specification of Charges since all of the violations enumerated therein will be proved at the hearing. In addition, there is no provision in either the Rules Governing Discipline of the Rules of Civil Procedure that permit requests for admission to be directed to opposing counsel which is what respondent seeks to do here.

A discovery deposition will elicit a witness' knowledge about the occurrence that is the subject of the proceeding in question, not what the deponent's testimony will be if called as a witness.. Respondent is well acquainted with all of the individuals listed by disciplinary counsel as witnesses and is well aware of their involvement in the proceedings that gave rise to the charges herein. Moreover, respondent has failed to identify any of the individuals he proposes to depose nor has he shown a need for the deposition testimony of any particular individual.

Finally, the fact that respondent is seeking discovery for purposes of harassment and delay becomes obvious when his proposed list of witnesses is established. Respondent ignores the fact that the conduct that is the subject of the Specification of Charges is essentially undisputed and is a matter of record. The attempt to depose practically every lawyer involved in the Clinesmith case as well as disciplinary counsel is nothing more than a vindictive attempt by the Clinesmith case as well as disciplinary counsel is nothing more than a vindictive

attempt by respondent to harass those who have opposed him.

Respondent's purported showing of need for the requested discovery is disingenuous at best. Respondent forgets that it is *his* conduct that is the subject of these proceedings and that by virtue of his requests for discovery he is in effect feigning ignorance of his own conduct. Furthermore, practically all of respondent's conduct that is the basis for the charges is documented by the court record in the Clinesmith matter that resulted in Judge Vanzi filing the complaint in the first instance. Respondent is well aware of all of the matters with respect to which he seeks discovery, his requests are nothing more than a fishing expedition, are clearly interposed solely for purposes of delay and should be denied.

IV.
Respondent's Motion To Continue Is Groundless and Should Be Denied

In support of his Motion To Continue, respondent argues that since Rule 17-313 requires that the formal hearing be set no later than 120 days from the expiration of time for filing an answer which respondent states is November 1, 2006, that the hearing should be set for that date to allow respondent to take the requested discovery. Respondent claims that a denial of his request would be a violation of his due process rights.

Again, respondent conveniently ignores the fact that the charges in this matter were filed on February 22, 2006 and that respondent has had at least from March 20, 2006, the date on which he filed a Challenge To Appointed Panel to take the discovery that he claims he needs. Instead, respondent has chosen to waste everyone's time with groundless motions and multiple challenges to the hearing panel. If respondent truly needed the discovery he now seeks, he surely would have proceeded expeditiously to obtain it. Instead, respondent is attempting to use his discovery request as a tool of delay and harassment. Respondent *has* received all of the process to which he is due.

WHEREFORE, disciplinary counsel moves for the entry of an Order denying respondents Motions.

Respectfully submitted,

/s/ Joel L. Widman
Joel L. Widman, Deputy
Disciplinary Counsel
PO Box 1809
Albuquerque, NM 87103-1809
505-842-5781

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2006, I served the foregoing Memorandum In Opposition by United States First Class Mail Postage prepaid and addressed to:

Robert P. Tinnin Jr. Esq.
Hearing Committee Chair
500 Marquette, NW Ste 1300
Albuquerque, NM 87102-5318

John P. Eastham, Esq.
2201 San Pedro, NE Bldg. 2
Suite 207
Albuquerque, NM 87110

Ms. Carolyn Tinker
1801 Camino Raso, NW
Albuquerque, NM 87107

Stuart L. Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Joel L. Widman
Joel L. Widman
Deputy Disciplinary Counsel

APPENDIX V

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 02-2006-505

IN RE:

STUART L. STEIN, ESQ.

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent. /

REQUEST FOR DISCOVERY

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and under the authority of Rule 17-311 of the Rules Governing Discipline seeks permission from the chairman of the hearing committee to conduct the following discovery:

I – REQUESTS TO PRODUCE

Showing of Need. Respondent needs to see all materials obtained by disciplinary counsel from third parties in their investigation to discovery what will be introduced at the final hearing, what will not be produced at final hearing and written statements of witnesses that may have been obtained. The initial complaining witnesses, Judge Linda Vanzi, has not been listed as a witness by disciplinary counsel. Judge Vanzi may have provided materials to disciplinary

counsel that were not forwarded with her initial complaint. Further, four witnesses listed in the Specification of Charges are attorneys.

Production of what such attorneys provided to disciplinary counsel may have bearing on the question of any attorney-client privilege with their respective clients and the selective disclosure to prejudice the matter against Respondent. Without having these materials for review prior to deposition of the witnesses, complete preparation for the final hearing will be fatally flawed. This can only be done with a Request for Production directed to Petitioner and responded to by disciplinary counsel. Disciplinary counsel failed to respond to a June 22, 2006 letter from Respondent to obtain this material. See, Exhibit A, attached hereto.

Additionally, without knowing what is in the hands of Petitioner, Respondent is not in a position to know what not to request from the other witnesses upon their deposition(s) to avoid them producing the same materials.

II – REQUESTS FOR ADMISSIONS

Showing of Need. Respondent needs to narrow and clarify the issues concerning the specific violations of the Rules of Professional Conduct raised in the Specification of Charges. Since paragraph 3 of the Specification of Charges lists violations of the Rules of Professional Conduct different from those listed in paragraph 48 of the Specification of Charges and

since this hearing committee has refused to allow the Motion to Dismiss partially based on this inherent inconsistent position, the only way Respondent can identify what violations Petitioner, through disciplinary counsel, intends to prove, amongst other issues, is by responses to Request for Admissions.

III – INTERROGATORIES

Showing of Need. Respondent needs to pin down under oath what actions taken on his part are considered by disciplinary counsel violations of the particular Rules of Professional Conduct. Without knowing what facts sought to be proved violate which Rules of Professional Conduct, Respondent is moving towards the final hearing blind. This can only be done with interrogatories propounded to Petitioner and responded to by disciplinary counsel.

IV – DEPOSITIONS

Showing of Need. Once the above requested discovery is obtained, depositions of all witnesses will be required to find out (1) what their testimony will be at the final hearing, (2) to explain inconsistencies with any of the positions previously taken based on the other discovery materials then produced and (3) any other matters pertinent to the veracity of their expected testimony. Further, since some witnesses are out of state, it may be impossible to have them appear at trial without unnecessary expense. Should their depositions be taken, their potential telephone

testimony will be better able to be comprehended by this hearing committee and a better record will be had for review, should that be necessary. Further, because of the number of witnesses, the trial date may not find that all these witnesses are available for live testimony and their depositions will have to be read into the record for the hearing committee to consider.

WHEREFORE, Respondent prays that all the requested discovery should be GRANTED.

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite 207, Albuquerque, NM 87110, Ms. Carolyn Tinker, 1801 Camino Raso, N.W., Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq., Deputy Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this July 3, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

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EXHIBIT A

[LOGO]

THE STEIN LAW FIRM

[Address Omitted In Printing]

June 22, 2006

Mr. Joel L. Widman
The Disciplinary Board
Post Office Box 1809
Albuquerque, NM 87103-1809

Re: Complaint of Judge Linda Vanzi Disciplinary Case No. 03-2006-505

Dear Mr. Widman:

Please supply copies of all materials obtained by your office from third parties on the above pending matter to this office. Should there he a charge for copies, please bill and it will be forwarded.

Yours very truly,
THE STEIN LAW FIRM

by /s/ Stuart L. Stein
Stuart L. Stein

APPENDIX W

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 02-2006-505

IN RE:

STUART L. STEIN, ESQ.

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent. /

ANSWER AND COUNTERCLAIM

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and serves this Answer and Counterclaim and in support thereof states as follows:

ANSWER

1. That Respondent hereby ADMITS the allegations contained in paragraph 1 of the Specification of Charges.

2. That Respondent hereby ADMITS the allegations contained in paragraph 2 of the Specification of Charges.

3. That Respondent hereby DENIES the allegations contained in paragraph 3 of the Specification of Charges and demands strict proof thereof.

4. That Respondent hereby DENIES the allegations contained in paragraph 4 of the Specification of Charges and demands strict proof thereof.

5. That Respondent has no knowledge of all the allegations contained in paragraph 5 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

6. That Respondent hereby ADMITS the allegations contained in paragraph 6 of the Specification of Charges in that N.M.S.A § 45-5402 speaks for itself but that there is no restriction in such statute for the preparation of testamentary instruments.

7. That Respondent has no knowledge of all the allegations contained in paragraph 7 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the trust document speaks for itself.

8. That Respondent has no knowledge of all the allegations contained in paragraph 8 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the trust document speaks for itself.

9. That Respondent has no knowledge of all the allegations contained in paragraph 9 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the pleading referenced speaks for itself.

10. That Respondent has no knowledge of all the allegations contained in paragraph 10 of the

Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the writing referenced speaks for itself.

11. That Respondent has no knowledge of all the subjective allegations contained in paragraph 11 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that pleadings in cases filed in the United States District Court speak for themselves.

12. That Respondent has no knowledge of all the subjective allegations contained in paragraph 12 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that pleadings filed in the United States District Court speak for themselves.

13. That Respondent has no knowledge of all the subjective allegations contained in paragraph 13 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that pleadings filed in the United States District Court speak for themselves.

14 to 32. That there are no paragraphs numbered 14 to 32 in the Specification of Charges, but the hearing committee in this cause did not allow the Motion to Dismiss to require that the this error be corrected in an Amended Complaint. Should there be a hidden or unrevealed paragraph(s) 14 through 32, Respondent hereby DENIES the allegations contained in such paragraph(s) of the Specification of Charges and demands strict proof thereof.

33. That Respondent has no knowledge of all the allegations contained in paragraph 33 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

34. That Respondent has no knowledge of all the allegations contained in paragraph 34 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

35. That Respondent has no knowledge of all the allegations contained in paragraph 35 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the writing referenced speaks for itself.

36. That Respondent hereby DENIES the allegations contained in paragraph 36 of the Specification of Charges and demands strict proof thereof.

37. That Respondent has no knowledge of all the subjective allegations contained in paragraph 37 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that transcript of the proceedings reference would be the best evidence of what occurred or what was said, subject to clarification.

38. That Respondent has no knowledge of all the allegations contained in paragraph 38 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and, further, that the pleading referenced in this paragraph.

39. That Respondent hereby DENIES the allegations contained in paragraph 39 of the Specification of Charges and demands strict proof thereof.

40. That Respondent hereby DENIES the allegations contained in paragraph 40 of the Specification of Charges and demands strict proof thereof.

41. That Respondent has no knowledge of all the allegations contained in paragraph 41 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

42. That Respondent has no knowledge of all the allegations contained in paragraph 42 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the record of the hearing and the Orders entered thereon will speak for themselves.

43. That Respondent hereby DENIES the allegations contained in paragraph 43 of the Specification of Charges and demands strict proof thereof and further states that the record of the hearing and the Orders entered thereon will speak for themselves.

44. That Respondent has no knowledge of all the allegations contained in paragraph 44 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

45. That Respondent has no knowledge of all the allegations contained in paragraph 45 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

46. That Respondent has no knowledge of all the allegations contained in paragraph 46 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

47. That Respondent has no knowledge of all the allegations contained in paragraph 47 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

48. That Respondent hereby DENIES the allegations contained in paragraph 48 of the Specification of Charges and demands strict proof thereof

49 to 53. That Respondent hereby DENIES the allegations of factors in aggravation contained in paragraph 49 through 53 of the Specification of Charges and demands strict proof thereof.

54. That no response is required for the listing of the witnesses in paragraph 54 of the Specification of Charges.

WHEREFORE the Specification of Charges should be **DISMISSED** with prejudice.

WITNESSES

NOTICE IS HEREBY GIVEN that Respondent may call the following witnesses at the final hearing on the matter:

All witnesses listed by Petitioner

Marvin E. Beckman, Esq.
Moody Bible Institute
820 North LaSalle Boulevard
Chicago, IL 60610

Mr. Michael Easley
President
Moody Bible Institute
1 LaSalle Street
Chicago, IL 60610-3284

Hon. Linda Vanzi
District Judge
Civil Division
Post Office Box 488
Albuquerque, NM 87103

Nell Graham Sale, Esq.
Ruth O. Pregenzer, Esq.
Robin A. Goble, Esq.
Miller Stratvert, P.A.
Post Office Box 25687
Albuquerque, NM 87125-0687

David L. Walther, Esq.
Walther Family Law
Suite 620
6501 Americas Parkway
Albuquerque, NM 87110

William K. Summers, M.D.
6000 Uptown Blvd
Albuquerque, NM 87110

Mrs. Ruth Clinesmith
7608 Winter, N.E.
Albuquerque, NM 87110

Mrs. Devina Delaney
7608 Winter, N.E.
Albuquerque, NM 87110

Ms. Elizabeth I. Brown
6824 Frantz Dr., N.E.
Albuquerque, NM 87109

C. David Henderson, Esq.
Downing & Henderson
Suite B-5
2074 Galisteo Street
Santa Fe, NM 87505-2157

Joel L. Widman, Esq.
Deputy Disciplinary Counsel
Post Office Box 1809
Albuquerque, NM 87103-1809

Virginia L. Ferrara, Esq.
Chief Disciplinary Counsel
Post Office Box 1809
Albuquerque, NM 87103-1809

Leonard E. Leetzow, Jr.
Smith Barney
Suite 1100
2 North Tamiami Trail
Sarasota, FL

COUNTERCLAIM CHALLENGING THE METHOD OF NEW MEXICO ATTORNEY DISCIPLINE AS CONSTITUTIONALLY INFIRM

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and serves this Counterclaim Challenging the Method of New Mexico

Attorney Discipline as Constitutionally Infirm and requests a declaratory judgment declaring same and prohibiting further action on the instant Specification of Charges and any other Specification of Charges to be brought in the future, if any, and in support thereof states as follows:

1. That the entire scheme of the procedure in attorney disciplinary proceedings before the New Mexico Supreme Court, the Disciplinary Board and its hearing committees and reviewing officers as currently established under Rule 17-101, *et seq.*, RGD are constitutionally infirm under the Fifth and Fourteenth Amendments of the United States Constitution. That the basis for this conclusion is outlined in the following paragraphs:

A. That hearing committees and hearing officers are appointed by the Disciplinary Board upon its own recommendations. Rule 17104.A. The process is not public and the criteria for selection of members of hearing committees or hearing officers is not part of the RGD.

B. That there are no specific rules of procedure in disciplinary matters in which an accused attorney can turn to know how a particular matter will be handled. Rule 17-301.B, RGD, incorporating the Rules of Civil Procedure for the District Courts "except where clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by" the RGD is fatally flawed since any attorney charged in a Specification of Charges should be able to know, absolutely, the rules of procedure upon which their

continued use of their license to practice will be determined.

C. That not strictly applying the Rules of Evidence denies an accused attorney the necessary notice to determine what evidence will be admitted and what will not be admitted, thus making adequate preparation for formal hearing virtually impossible. Further, the question of the evidentiary proof of matters is unclear. Disciplinary counsel considers that the proof necessary for all violations of the Rules of Professional Conduct other than false or fraudulent conduct is preponderance of the evidence. False or fraudulent conduct is proved by clear and convincing evidence. Since attorney discipline matters are quasi-criminal in nature, the level of proof required on all matters to pass constitutional muster is "clear and convincing". Such is required for judicial discipline. See, Rule 30 of the New Mexico Judicial Standards Commission. As a matter of public policy, for the protection of the rights of judges to judicial office or the rights of lawyers to continue their private practice, the burdens of proof for discipline should be identical. The potential harm of a wayward judge to the public is infinitely higher than the harm to be caused by a wayward lawyer.

D. That the investigative advantage of disciplinary counsel to obtain information from attorneys, including from a respondent attorney, over the targeted attorney is fatal to a fair system. Disciplinary counsel consistently reminds target attorneys and attorney witnesses of their affirmative duty and responsibility under Rule

16-803.D to cooperate with them in all investigations. The subjective opinion of disciplinary counsel that an attorney is "non-cooperative" can lead to the filing of formal charges. Such attorneys who cooperate with disciplinary counsel consistently refuse to cooperate in the same fashion with targeted attorneys and/or their counsel.

E. That a further investigative advantage of disciplinary counsel to obtain information is that they have four years, in most cases, in which to conduct an investigation until they are faced with the statute of limitations issue under Rule 17-303 RGD. During this period of time disciplinary counsel can propound an unlimited number of interrogatories to the respondent attorney. Rule 17-306.A.(1) RGD. During this period of time disciplinary counsel can obtain under power of subpoena the deposition, documents and records of the respondent attorney and other witnesses. Rule 17-306.A.(2) RGD. Respondent Attorney has nothing equivalent whatsoever under the RGD for his or her own investigation during this period prior to the filing of a formal specification of charges.

F. That disciplinary counsel consistently violates Rule 17-307.C by ignoring the requirement to advise the respondent attorney of the allegations contained in a specification of charges prior to their filing by claiming that sending a copy of the written complaint filed with the office of the disciplinary board is adequate compliance with this rule. In the instant Specification of Charges there are claimed violations of eight the Rules of Professional Conduct that were not

mentioned in the complaint initially filed with the Disciplinary Board. Therefore, this Respondent had no ability to present any matter of fact or mitigation he wanted disciplinary counsel to consider. It is verily believed that disciplinary counsel has never asked for the consent of any respondent attorney to join with him or her to conduct an informal hearing allowing the parties to present evidence and witnesses.

G. That disciplinary counsel alone determines if a file should be reviewed by a reviewing officer. Rule 17-307.D, RGD. A respondent-attorney may not elect to seek this review prior to the filing of a specification of charges under Rule 17-309.A, RGD.

H. That there is no assurance that any determination of the hearing committee or the appeal from any determination of the review of a committee of the Disciplinary Board is given any plenary review by any duly constituted judge or court.

I. That there are other flaws in the attorney disciplinary system that will be uncovered during discovery.

2. That Disciplinary Counsel fails to follow even the infirm Rules of Discipline, as outlined above, to the disadvantage of this individual Respondent and all Respondents who face filed Specification of Charges.

3. That in light of the foregoing, the entire disciplinary system is in violation of the Fifth and

Fourteenth Amendment to the United States Constitution as applied to Respondent.

WHEREFORE, Respondent prays for the following relief:

A. That upon adequate discovery, declare that the attorney disciplinary system in New Mexico is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. Bifurcate the hearing on the Specification of Charges and the Counterclaim, allowing the Counterclaim to move forward first.

C. That upon the success of the Counterclaim, dismiss all pending Specification of Charges until the attorney disciplinary system will meet constitutional muster.

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite 207, Albuquerque, NM 87110, Ms. Carolyn Tinker, 1801 Camino Raso, N.W., Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq., Deputy Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this July 3, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

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APPENDIX X

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

ORDER DENYING RESPONDENT'S ALTERNATIVE MOTION TO DISMISS SPECIFICATION OF CHARGES, RESPONDENT'S MOTION FOR GRANTING THE APRIL 29, 2006 ALTERNATIVE MOTION TO DISMISS SPECIFICATION OF CHARGES AND SETTING TIME FOR FILING OF ANSWER, AND RESPONDENT'S REQUEST FOR HEARING ON PENDING MOTIONS

This matter having come before the Hearing Committee on Respondent's Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline, dated April 29, 2006 and Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and/or More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline under Rule 1-007.1.D for Failure to Respond, dated May 22, 2006; the Hearing

Committee having considered the Motions, Disciplinary Counsel's Memorandum in Response to said motions and Respondent's Reply, as well as Respondent's Request for Hearing on Pending Motions, and being otherwise fully advised in the premises,

FINDS:

1. Said Motions are without merit and should be denied.

2. While the Committee believes that the fifteen day time limit prescribed by Rule 1-007.1 of the Rules of Civil Procedure is applicable in disciplinary proceedings because said rule is not "clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by. . . ." the Rules Governing Discipline, the issue is not beyond debate and the Committee should exercise its discretion in favor of resolving the issues raised in this case by a hearing on the merits.

It is, therefore, ORDERED that

A. Respondent's Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline and Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Failure to Follow the Rules Governing Discipline under Rule 1-007.1.D for Failure to Respond should be and hereby are denied.

B. The Committee's ruling with regard to these pending motions alleviates any necessity for a hearing, so that Motion is also denied.

C. Respondent is granted until June 30, 2006 to file his Answer to the Complaint. Dated this 22nd day of June, 2006.

By: /s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee Chair
for the Hearing Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June 2006, I mailed the foregoing Order to the following:

Joel L. Widman
Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
Albuquerque, NM 87103-1809

Stuart Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, 87110

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.

APPENDIX Y

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 03-2006-505

IN RE:

STUART L. STEIN, ESQ.,

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent. /

RESPONDENT'S REPLY TO DISCIPLINE COUNSEL'S JUNE 6, 2006 MEMORANDUM IN RESPONSE TO RESPONDENT'S APRIL 29, 2006 MOTION TO DISMISS

COMES NOW Respondent, by and through the undersigned firm, and in Reply to the June 6, 2006 Discipline Counsel's Response to Respondent's April 29, 2006 Motion to Dismiss states as follows:

I - INTRODUCTION

The thrust of the Motion to Dismiss was that the Specification of Charges – the charging document – does not articulate what actions of Respondent are claimed to be violations of what specific Rules of Professional Conduct. Further, the Specification of Charges has two sections/paragraphs in which different multiple listings of breaches of the Rules of Professional Conduct are listed. Respondent does not

know what particular actions is claimed to have violated what rule or rules of the Rules Professional Conduct. The Due Process section of the Fifth and Fourteenth Amendments to the United States Constitution require the pairing of the act or acts and the violation of the rules.

II – DISCIPLINE COUNSEL FAILS TO RESPOND TO FACTUAL ISSUES

Putting aside the issues of ex parte contact(s) which ultimately led directly to the service of the Response to the April 29, 2006 Motion to Dismiss 38 days after service on June 6, 2006, the Response Memorandum of discipline counsel is a non-response. The essence of any ethical charge is to describe particular actions of an attorney and the Rule of Professional Conduct that is claimed to have been violated.

After wrongfully claiming in a blanket statement that the Rules of Civil Procedure doe [sic] not apply, discipline counsel claims that the Specification of Charges filed in this cause is enough notice as to the acts that violate the Rules of Professional Conduct. This is not a response – it is just a blanket denial that anything needs to be done. Proper practice would have the acts of Respondent that rise to one violation of the Rules of Professional Conduct contained in a separate count of a Specification of Charges. It is only when that is done that any Respondent can be put on notice as to what he or she needs to defend at final hearing.

Discipline counsel insults this hearing committee by reference to matters that are not part of the record: the initial complaint presented to the office of discipline counsel by District Judge Vanzi which gave rise to the Specification of Charges. Because the office of discipline counsel sends a copy of the initial complaint papers to Respondent, Respondent is then on notice as to the specific wrongful acts for which he will have to defend at final hearing. Judge Vanzi mentioned some violations of the Rules of Professional Conduct she subjectively felt were violated. The Specification of Charges mentions many more. Further, Judge Vanzi was not listed as a witness in the Specification of Charges. If the undersigned filed a complaint against Judge Vanzi, he is prohibited from discussing same by the confidentiality provisions of the New Mexico Constitution in creating the Judicial Standards Commission and the Rules of the Judicial Standards Commission.[3] If the undersigned responded by asking disciplinary counsel what are the provisions of the Rules of Professional Responsibility that are violated, his response would be that the letter of the client speaks for itself. The June 6,

---

[3] It should be noted that the undersigned did file a federal suit to set aside the confidentiality provisions of the New Mexico Constitution and Judicial Standards Commission. A motion to dismiss was denied by the federal judge on June 15, 2006. After an Answer is filed by Defendant Commission in the federal case, cross motions for summary judgment should be filed and the case resolved on that basis.

2006 written response does not meet Due Process constitutional muster.

Additionally, disciplinary counsel is silent on the review of the Specification of Charges by Chief Disciplinary Counsel Virginia L. Ferrara under Rule 17-307(E). Ms. Ferrara, under deposition, discusses the review process and the way she approves, disapproves or approves with modification all Specification of Charges. See, Exhibit A, Deposition of Virginia Ferrara of May 24, 2006, pg. 21, line 7 to pg. 22, line 25. There is a form that Ms. Ferrara signs to approve a Specification of Charges. Failure to supply this document with the Response can only mean it was not done and this Specification of Charges must be dismissed.

Lastly, discipline counsel is also silent concerning why he failed to respond to the Motion to Dismiss until 38 days after service of the motion. It was this same Hearing Committee that in the Bogarosh case granted relief after neither of the disciplinary counsel on that case failed to timely respond as motion practice is outlined in the Rules of Civil Procedure for the District Court. Why the Committee did not do so here is unknown. Discipline counsel says nothing and gives no excuse for serving a timely response and his neglect of a legal matter.

III – CONCLUSION

WHEREFORE, for any of the above reasons, the Motion to Dismiss should be **GRANTED**.

I HEREBY CERTIFY that the original and a true copy of the foregoing was hand delivered to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102 and copies to John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite 207, Albuquerque, NM 87110; Ms. Carolyn Tinker, 1801 Carnino Raso, N.W., Albuquerque, NM 87107, Committee Members and Joel L. Widman, Esq., Deputy Disciplinary Counsel, 400 Gold Avenue, S.W., Suite 800, Albuquerque, NM 87103-1809 this June 20, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
Case Number CIV-05-928 BB/ACT

STUART L. STEIN and
STUART L. STEIN, P.A.,
a professional law
corporation d/b/a THE
STEIN LAW FIRM,

Plaintiffs,

vs.

LEGAL ADVERTISING COMMITTEE,
et al.,

Defendants.

DEPOSITION OF VIRGINIA FERRARA
May 24, 2006
2:06 p.m.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE, this deposition was:
TAKEN BY: MR. STUART L. STEIN
Attorney for Plaintiffs

REPORTED BY: Sally Peters, RPR, CCR 57
Bean & Associates, Inc.
Professional Court Reporting Service
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

* * *

[18] Q And it could have been that the lawyer who is under investigation said, "Now, wait a second. Time out. Let's wait until all of this settles out on the civil – on the criminal side, and then I can deal with you guys"?

A Correct.

Q Do you ever recall a time when a request for a stay was made, either by counsel office, discipline counsel's office, or the lawyer where the request for stay was denied?

A Yes, several times.

Q Okay. And tell me what the basis was for the denial, if you can recall?

A That the issues were different, the issues in the two proceedings were totally different, or that in a criminal case, the crime alleged was so egregious that we needed to proceed somehow, and in those cases, often that would involve a motion for summary suspension.

Q So it could be where somebody was stealing money?

A Correct.

Q Or they were charged with a felony crime of violence or something like that?

A Correct.

[19] Q But other than a perceived need to see that this lawyer stopped practicing at once, do you recall any other times where the charges or the activity complained about were not so egregious where such stay was rejected?

A I don't recall specific instances, but I know that there have been some hotly debated requests for stay, and that sometimes board members would say, "No way we are going to keep going on this," sometimes when we will request a stay.

Q That would go against your request?

A Correct.

Q If a lawyer who is being investigated by your office responds back from your request for information saying, "Wait a second. There is a civil case here that these issues are going to be determined about. Let's wait and see," and if discipline counsel decides not to wait and see, are they ever notified they can go to the board or they can go to the chairman?

A We just automatically take that request to the board. See, we have gotten a request from this or that lawyer to hold this in abeyance. They are not notified. It just goes there.

Q Okay. And after it goes to the board and [20] the board decides, no, you shouldn't abate it, do you then notify the lawyer and say, we took this to the board and they said no?

A Yeah. Yes.

Q So that's the way the office works?

A Yes.

Q All right.

A When I think of it, when we get a request from a lawyer, I just write to them and say, "We couldn't stop these proceedings, but I will present it to the board at their next meeting," and let them know what they say.

Q And that's what all discipline counsel should be doing?

A Yes.

Q Now, when a specification of charges is determined to be drafted and served, how is that decision reached?

A The investigating attorney prepares a specification of charges and gives it to me, and I go through it and either approve or disapprove it after talking with the attorney and saying, well, why do you think this and why do you think that? It used to be that the rule required a report, and the same kind of way that the report is now sent to a reviewing [21] officer, but it was determined by the board at some point in time that that was kind of a wasted exercise, that just going over the charges, that we could pretty much determine whether or not there was probable cause.

Q Okay.

A So I will then look at the factual allegations, and from there I will look at the rules violations, and I will say, "I mean, assuming you prove all these facts, why does that involve a violation of this rule, or assuming you prove all these facts, how are you going to do it? By the way, why aren't you alleging the violation of this rule," that kind of stuff.

Q Okay. And that's under that 17-307(E), correct?

A Yes.

Q All right. So this meeting that you have with the investigative assistant discipline counsel or deputy discipline counsel is an informal meeting?

A Correct.

Q And there are no notes taken about that?

A Correct.

Q It's not that I am trying to make the analogy, sometimes in practice when people have to do [22] things on a file, there will be somewhere with their initials and they date it, that we did it on this date?

A There is one of those included.

Q Okay.

A There will be a – I don't know what it's called, just one page thing that I sign, and it says, on this date I reviewed the charges and approved them for

filing or disapproved them or approved them with modification – check, check, check.

Q Okay.

A And the date.

Q And that's on the inside of the file itself, or is that kept in a separate place?

A It's in the file, working file.

Q All right. The working file that is held by the discipline counsel in charge of prosecuting the case?

A Yes.

Q And is this just a one-page item that you sign that just concerns this review prior to filing?

A Yes.

Q All right. So once the specification of charges comes to you and you review it and approve it, what is the next step?

[23] A To notify the chairman that this is being filed and provide him with a copy. Once upon a time the chairman kept all of the original copies. They were physically filed with the chairman, but under this system as it operates with a different chairman –

Q Every year?

A – every year, and confidentiality problems and problems with having a chairman who may not have a place to store these things, then the original

currently goes to the chairman of the hearing committee. What happens is that Denise, who is our administrative assistant, will call the chairman and say, "We have charges filed against so and so. Who do you want to put on the hearing committee?"

And the chairman will say, "Put so and so and so and so and so and so," and then she will write up a notice in designation of the hearing committee, send the original to the chair, and the copies to each of the other members.

Q Okay. And then the copy of that letter and the copy of the specification of charges then is served or mailed to the lawyer who is the respondent?

A Yes.

Q Okay.

[24] MR. STEIN: You know, I think this was No. 2 and 3, weren't they, Jerry?

MR. WALZ: I think so.

Q (BY MR. STEIN) We called the two orders 2 and 3 before 1 and 2. They should be 2 and 3. No. 1 was the request for production, and what was produced by Mr. Walz on behalf of the defendants in this case is what has been marked as No. 1, and there is about ten pages or so of both lay people on one page and lawyers on another for the three divisions within the state, the Southern, Central, and Northern divisions, of people who are hearing officers or potential members of the committee?

A Yes.

Q Could you tell me if you know where these particular copies came from?

A Mr. Walz, where did he get them?

Q Yes. Did it come from your office?

A It came from our office.

Q Okay:

MR. WALZ: I'm sorry. I thought you were asking where did they get the information to put on the lists.

MR. STEIN: No, no, no.

Q (BY MR. STEIN) I just wanted to know that if [25] we went to your office now and said, could you show us who are the people who are potential members of the hearing committees there, they would pull out these 10 or 15 pages.

A Correct. Probably we would pull out the current list. We – Denise will put out a list. Then people drift off or die or horrible things like that and get taken off the list, and this is like –

Q This is?

A – then a new list is produced and the missing members are no longer there.

Q So here we have – somewhere there are handwritten notations, and that on an irregular basis Denise may just do up a brand new, clean list?

A Yes.

Q And say that is the list as of this date?

A Yes.

Q And these are the people involved?

A Yes.

Q All right. Now, you say Denise will ask the chair who the chair wants on the committee?

A Yes.

Q And does the chair have a copy of this list?

A Yes.

Q And do you know if the chair goes through

* * *

APPENDIX Z

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 03-2006-505

DISCIPLINARY COUNSEL'S MEMORANDUM IN RESPONSE TO ALTERNATIVE MOTIONS TO DISMISS AND TO MOTIONS TO GRANT ALTERNATIVE MOTIONS TO DISMISS

Respondent's Alternative Motions To Dismiss are based on two faulty premises, first, that the Charges are defective because they do not allege what specific conduct violated the Rules that are alleged to have been violated and, second, that respondent was never advised of the general nature of the allegations prior to the filing of formal charges.

Rule 17-309 NMRA governs the contents of the specification of charges. That Rule provides that the specification contain a brief and plain statement of the charge or charges, the provisions of the Rules of Professional Conduct alleged to have been violated, the names and addresses of all known witnesses and the name and address of disciplinary counsel who is expected to prosecute the matter. There is no

requirement that the charges allege what conduct violated which Rules with the particularity required by respondent. Although disciplinary counsel believes the Rules of Civil Procedure to be inapplicable, the requirement for a pleading setting forth a claim for relief is merely a "short and plain statement of the claim showing that the pleader is entitled to relief." The Specification of Charges herein clearly exceeds either standard.

Respondent's contention that without the specificity he requests it is impossible for him to respond to the charges is disingenuous at best. The Charges clearly describe the conduct in which respondent is alleged to have engaged. Certainly respondent is capable of admitting or denying whether he engaged in the conduct alleged in the Specification of Charges.

With respect to respondent's assertion that he was not advised of the general nature of the charges at the investigatory stage as required, by Rule 17-307(C), a copy of the complaint filed by Judge Vanzi was sent to respondent on September 22, 2005. Respondent initially responded by requesting that the matter be stayed because Judge Vanzi's orders were being appealed (an appeal which was never pursued). When that request was rejected, Respondent next stated that he would respond conditioned on a stipulation for full discovery prior to hearing. On October 14, 2005 respondent finally responded stating, *inter-alia* that it was his intention to file a complaint against Judge Vanzi with the Judicial Standards Commission. At no time until the filing of the instant

Motions has respondent contended that he was not advised of the general nature of the allegations against him or did not understand what this matter was about. Respondent, in effect, claims that he is entitled to a bill of particulars prior to the filing of charges. That is clearly not the case. Respondent was entitled to be advised of the *general nature* of the charges and he was.

Respondent has also moved to grant his Motions To Dismiss on the grounds that disciplinary counsel did not respond to said Motions within the 15 day time limit prescribed by Rule 1-007.1 of the Rules of Civil Procedure. It is respectfully submitted that since motion practice before hearing committees is provided for by Rule 17-312(A), the Rules of Civil Procedure are inapplicable, Rule 17-301 NMRA clearly states that except where clearly inapplicable "*or otherwise provided for by these rules*," the Rules of Civil Procedure shall be used. Motion practice is clearly provided for within the meaning of Rule 17-301(B). Even if the Rules of Civil Procedure were applicable, dismissal would not be mandatory but would be within the discretion of the hearing committee. Disciplinary counsel urges the hearing committee to exercise its discretion in favor of resolving this matter by a hearing on the merits.

WHEREFORE, disciplinary counsel moves for the entry of an Order denying respondent's Motions.

Respectfully submitted,

/s/ Joel L. Widman

Joel L. Widman, Deputy
Disciplinary Counsel
400 Gold Avenue, SW Suite 800
PO Box 1809
Albuquerque, NM 87103-1809
505-842-5781

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2006, I served the foregoing Memorandum by facsimile transmission directed to:

Robert P. Tinnin, Jr., Esq.
Hearing Committee Chair
768-1529

Stuart L. Stein, Esq.
889-0953

/s/ Joel L. Widman
Joel L. Widman

APPENDIX AA

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 03-2006-505

IN RE:

STUART L. STEIN, ESQ.,

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent. /

ALTERNATIVE MOTION TO DISMISS SPECIFICATION OF CHARGES AND/OR MOTION FOR MORE DEFINITE STATEMENT AND/OR DISMISSAL FOR FAILURE TO FOLLOW THE RULES GOVERNING DISCIPLINE

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm and serves this Alternative Motion to Dismiss the Specification of Charges and/or Motion for More Definite Statement signed on February 22, 2006 and/or Dismissal for Failure to Follow the Rules Governing Discipline, and in support thereof states as follows:

MOTION TO DISMISS/MOTION FOR MORE DEFINITE STATEMENT

1. That this is a Motion to Dismiss under Rule 1-012 and/or Motion for More Definite Statement of the Rules of Civil Procedure for the District Courts, a

rule that is not clearly inapplicable with the Rules Governing Discipline.

2. That the Specification of Charges has 47 paragraphs of allegations and, in paragraph 48, conclusions that Respondent violated 12 different Rules of Professional Conduct.

3. That there is no specific connection made in the Specification of Charges concerning the 47 paragraphs of facts with any of the 12 claimed violation of the Rules of Professional Conduct to put Respondent on notice as to what conduct was violative of which Rule.

4. That without such specificity, it is impossible for the Respondent to responsively plead to the allegations or to know how to prepare for a final hearing on the charges. For instance, in subparagraphs a. and j. in paragraph 48, there are allegations of fraud, dishonesty, deceit or misrepresentation without any connection to allegations of facts contained in prior paragraphs. Rule 1-009.B requires that allegations of fraud "shall be stated with particularity". This was not done. The word "fraud" or "fraudulent" does not appear in paragraphs 1 through 47 of the Specification of Charges. Respondent is not on notice as to what actions contained in paragraphs 1 through 47 constitute what violations of the Rules of Professional Conduct.

5. The Specification of Charges should be DISMISSED with leave to file an Amended Specification

of Charges to connect the factual allegations with the violations of the Rules of Professional Conduct.

6. That, in the alternative, Disciplinary Counsel should be ORDERED to file a More Definite Statement that would connect the claimed specific claimed violations of the Rule of Professional Conduct with specific claimed acts of the Respondent. There are twelve (12) Rules of Professional Conduct that are claimed to have been violated in paragraph 48, thirteen (13) in paragraph 3. Upon Disciplinary Counsel identifying the claimed violations of each rule with the claimed acts of Respondent, then Respondent and this Hearing Committee will be able to focus on the individual accusations that make up the wide sweep of this Specification of Charges. It will also allow the Respondent effectively to defend each charge in pretrial motions, seek discovery on each point and file potential dispositive motions. Further, requiring a More Definite Statement will allow the Respondent and this Hearing Committee to organize the presentment and understanding of evidence for each charge to be sure that the burdens are met on all sides.

7. That paragraph 54 of the Specification of Charges makes references to a "Count III". There is no Count III identified prior to paragraph 54. There is also no Count I or Count II.

WHEREFORE, the Specification of Charges should be DISMISSED with leave to file an Amended Specification of Charges or, in the alternative, Disciplinary

Counsel should be ORDERED to serve a More Definite Statement connecting all allegations of fact with each and every claim of violation of the Code of Professional Responsibility.

DISMISSAL FOR FAILURE TO FOLLOW THE RULES GOVERNING DISCIPLINE

8. That the Rules Governing Discipline states, in part, as follows:

> Prior to the filing of a formal specification of charges with the Disciplinary Board the respondent-attorney **shall always** be advised of the general nature of the allegations and shall be given a fair opportunity to present any matter of fact or mitigation the respondent-attorney wants disciplinary counsel to consider.

Rule 17-307.C, Rules Governing Discipline, emphasis supplied. Allegations in a specification of charges are violations of specific Rules of Professional Conduct. At no time prior to the service of this particular Specification of Charges did the office of Disciplinary Counsel inform the Respondent of the twelve (12) claimed violations of the Rules of Professional Conduct and the facts supporting the claimed violations. Respondent, prior to the filing of the Specification of Charges, was only on notice of violations of six claimed violations of the Rules of Professional Conduct made in the initial complaint letter filed with the Office of Disciplinary Counsel and copied to

Respondent. Of the six, only four of the rules noted are charged in the Specification of Charges.

Clearly, somewhere along the line disciplinary counsel came up with nine other Rules of Professional Conduct where Respondent was found wanting. Respondent was entitled to notice of the allegations prior to filing under Rule 17-307. The office of disciplinary counsel has consistently failed to follow this Rule. Without the sanction of dismissal, they will continue to conduct themselves contrary to the rules to the detriment of the entire membership of The State Bar of New Mexico.

9. That, further, Rule 17-307.E requires that a draft of the instant Specification of Charges be presented to Chief Disciplinary Counsel Virginia L. Ferrara. Considering the basic errors and omissions in this Specification of Charges, Respondent has legitimate question that this was done. This objection can be adequately met by an affidavit of Ms. Ferrara directed to the date this was done and the paper or papers indicating she performed her required task under this Rule. If this was not done, the Specification of Charges should be DISMISSED.

WHEREFORE, the Specification of Charges should be DISMISSED with instructions to discipline counsel to advise the Respondent of all allegations and give him a fair opportunity to respond as required by Rule 17-307.C and ORDER that Chief Disciplinary Counsel file an Affidavit that she performed her duty of review under Rule 17-307.E. and,

if her duty was not done, DISMISS the Specification of Charges for the purposes of having such review and then file the Specification of Charges, if such determination should be made, and re-start the proceeding.

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite 207, Albuquerque, NM 87110, Ms. Carolyn Tinker, 1801 Camino Raso, N.W., Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq., Deputy Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this April 29, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

APPENDIX BB

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

SPECIFICATION OF CHARGES

1. Rule 17-105(B)(3)(d) of the New Mexico Supreme Court Rules Governing Discipline empowers counsel for the Disciplinary Board to file a specification of charges against an attorney with the Disciplinary Board.

2. Stuart L. Stein, Esq., hereinafter respondent, is an attorney licensed to practice law before the courts of the State of New Mexico.

3. The factual allegations set forth in the Specification of Charges state acts of professional misconduct by the Respondent in violation of Rules 16-102(D), 16-107(A), 16-107(B), 16-109(A), 16-301; 166-303(A)(2), 16-303(A)(3), 16-401(B), 16-402, 16-803(D), 16-804(C), 16-804(D) and 16-804(H) of the Rules of Professional Conduct.

4. Pursuant to Rule 17-309(A) of the Supreme Court Rules Governing Discipline, cause exists to conduct a

hearing on the following charges so that the Disciplinary Board and the Supreme Court can determine whether further action is appropriate.

5. In March, 2005, a Petition was filed by Cathe Temmerman seeking the appointment of a guardian and conservator for her father, Bruce C. Clinesmith, in the matter entitled *In the Matter of Bruce C. Clinesmith, An Adult Incapacitated Person,* No. PQ-2005-00063 in the Second Judicial District Court, Bernalillo County, New Mexico. Richard Reidy was appointed guardian *ad litem* by the court on March 4, 2005.

6. By operation of law, after notice of the filing of a petition seeking the appointment of a conservator, the court in which the petition is filed has exclusive jurisdiction to determine how the estate of the protected person shall be managed, expended or distributed (45-5-402 NMSA 1978).

7. At the time of the filing of the Petition there were in existence two trusts created by Bruce Clinesmith. One of the trusts was a revocable trust created by Bruce Clinesmith on January 31, 1997, with Moody Bible Institute of Chicago (hereinafter the "1997 Trust") as Trustee and which provided, *inter-alia,* for the income and principal to be paid to Bruce Clinesmith as needed with the remainder to Moody upon his death. The corpus of the Moody trust was $6,275,000.00.

8. The other trust (hereinafter the "1999 Trust") was a revocable trust created by Bruce Clinesmith on

October 29, 1999, the income and principal of which were to be paid to Bruce Clinesmith as required and upon his death the remainder was to be held in trust for his wife, Ruth, with the income and principal to be paid to her as required. Upon Ruth's death, the remainder to be paid to Moody. The corpus of the 1999 trust was $4,800,000.00.

9. Respondent appeared on behalf of Bruce C. Clinesmith and his wife, Ruth Clinesmith in Cause No. PQ-2005-00063 and on March 28, 2005, filed an Answer to the Petition on behalf of Bruce Clinesmith and Ruth Clinesmith requesting that Ruth Clinesmith be appointed as guardian for Bruce Clinesmith, if in fact the court determined a guardian should be appointed. The Answer further alleged the existence of a Durable Power of Attorney executed by Bruce Clinesmith on January 30, 2004, in favor of his wife and stated that the court should not disregard the clear intent of Bruce Clinesmith, presumably as evidenced by the Power of Attorney.

10. On March 28, 2005, the same date on which respondent filed an Answer to the guardianship/conservatorship Petition, respondent wrote to representatives of the Moody Bible Institute of Chicago demanding that the income and corpus of the 1997 Trust and the 1999 Trust be paid to Ruth Clinesmith, individually.

11. Notwithstanding his knowledge of the pendency of the guardianship and conservatorship proceeding in state district court together with the above-cited

statute, respondent filed two lawsuits in the United States District Court for the District of New Mexico on behalf of Ruth Clinesmith seeking to affect the manner in which the estate of Mr. Clinesmith would be managed, expended and distributed.

12. The first lawsuit was filed on June 15, 2005 on behalf of Ruth Clinesmith, individually, and purportedly on behalf of Bruce C. Clinesmith, "by Ruth M. Clinesmith, his attorney-in-fact" pursuant to the January 30, 2004, Durable Power of Attorney referred to above, seeking *inter-alia* that the trusts created by Bruce Clinesmith in favor of Moody Bible Institute of Chicago be voided and that the corpus of the trusts be declared to be community property. This lawsuit will be referred to herein as the Moody Bible lawsuit. The value of the trusts at the time of filing was alleged to be approximately $11,000,000.00.

13. The second lawsuit was filed on June 22, 2005, on behalf of Ruth Clinesmith, individually, against Citigroup Global Markets, Inc. (the Citigroup lawsuit) alleging the existence of a joint account in the names of Bruce Clinesmith and Ruth Clinesmith and that the account was restricted by Citigroup without authority. In the lawsuit, Ruth Clinesmith sought damages or, in the alternative, full access to the account.

33 [sic] The account, which was alleged to be in the approximate amount of $250,000.00, was "frozen" by

Citigroup because of their concerns that Bruce Clinesmith's mental health had deteriorated and their uncertainty that he fully comprehended his actions.

34. [sic] Respondent negotiated a settlement of the Citigroup suit pursuant to which the account in question was to be transferred to an account with another broker, which account was in the name of Ruth Clinesmith only, thus cutting off Bruce Clinesmith's access to the account and the funds on deposit therein. The settlement was confirmed in a letter sent by respondent to Citigroup Associate General Counsel on July 13, 2005, forwarding a copy of the power of attorney in response to their request. The letter also confirmed Citigroup's representation that the freeze on the account would be lifted and that the case was "effectively settled upon the account being transferred to another broker. . . ."

35. [sic] On July 15, 2005, respondent again contacted Citigroup by letter advising of the account to which the funds were to be transferred and again on July 28, 2005 complaining of delay in effectuating the transfer.

36. [sic] In none of these letters or other verbal communications between respondent and Citigroup did respondent advise Citigroup of the following:

a. A Verified Petition For The Appointment Of A Guardian And Conservator for Bruce Clinesmith had been filed in state District Court on March 4, 2005 and that a Guardian

Ad Litem had in fact been appointed for Bruce Clinesmith by the court on that date;

b. On June 3, 2005, the court in which the guardianship proceeding was pending issued a Notice scheduling a hearing on July 18, 2005 to determine whether a guardian and conservator should be appointed for Bruce Clinesmith;

c. On June 27, 2005, the court in which the guardianship proceeding was pending issued a Notice of Hearing scheduling a pending Motion To Disqualify respondent from representing Bruce C. Clinesmith because of a conflict of interest between him and his wife, Ruth Clinesmith.

d. On July 18, 2005, a hearing on the pending matters was held and the court granted the Motion to Disqualify respondent from representing Bruce Clinesmith in both the guardianship/conservatorship proceeding and in the lawsuit against the Moody Bible Institute because representing both Ruth Clinesmith and Bruce Clinesmith constituted an impermissible conflict of interest.

e. In the course of the July 18, 2005 hearing, the court also appointed Decades, LLC as full temporary guardian and temporary conservator for Bruce Clinesmith and revoked the durable power of attorney of January 20, 2004 pursuant to which Bruce Clinesmith had appointed Ruth Clinesmith as his attorney in fact.

37. [sic] During the course of the July 18, 2005, hearing respondent stated on the record: "I agree that Mr. Clinesmith is incapacitated to the extent that he may need a guardian or conservator."

38. [sic] In the complaint prepared and filed by respondent in the Moody Bible suit, he alleged that in August 2004, Mr. Clinesmith was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis."

39. [sic] On August 18, 2005, after respondent had been disqualified from representing Bruce Clinesmith and after Decades LLC had been appointed temporary guardian and conservator of Bruce Clinesmith and notwithstanding his own recognition of Bruce Clinesmith's incapacity, respondent went to the dementia unit of the Woodmark, a residential care facility in which Bruce Clinesmith was a patient. Respondent had Bruce Clinesmith removed from the dementia unit and taken to a private room, where he presented Bruce Clinesmith with a new will and trust which he asked Bruce Clinesmith to execute and which Bruce Clinesmith did in fact execute.

40. [sic] Respondent did not notify Richard Reidy, the guardian *ad litem*, or Decades LLC, the temporary guardian and conservator, of his visit to Bruce Clinesmith either before or after the visit nor did respondent obtain leave of court to make the visit to Bruce Clinesmith.

41. [sic] Upon learning of respondent's meeting with Bruce Clinesmith and Bruce Clinesmith's execution of

the will and trust prepared by respondent, Decades LLC filed a Motion To Prohibit Interference With Temporary Guardian And Conservator Decades, LLC's Performance Of Duties And Exercise Of Powers Pursuant To Court Order Dated August 5, 2005, And Request For Emergency Expedited Hearing.

42. [sic] The court held a hearing of the Decades, LLC Motion on August 22, 2005, and entered an Order, *inter-alia*, enjoining respondent from having any contact with Bruce Clinesmith, voiding the will and trust executed by Bruce Clinesmith on August 18, 2005, and awarding Decades, LLC the attorneys' fees incurred by it in connection with the Motion.

43. [sic] On September 1, 2005, by Order of that date, the court in the guardianship and conservatorship proceeding disqualified respondent from any continued representation of Ruth Clinesmith. The grounds for the disqualification were that respondent formerly represented Bruce Clinesmith, that the continued representation of Ruth Clinesmith was substantially related to the representation of Bruce Clinesmith, and that the interests of Ruth Clinesmith are materially adverse to those of Bruce Clinesmith.

44. [sic] Respondent did not advise the federal court in the Moody Bible lawsuit of the entry of the July 18, 2005 Order revoking the power of attorney (pursuant to which he purported to represent the interests of Bruce Clinesmith in that matter) and disqualifying him from representing the interests of Bruce Clinesmith

in that proceeding as well as in the guardianship/conservatorship proceeding.

45. [sic] Respondent did not advise the federal court in the Moody Bible lawsuit of the September 1, 2005, Order entered in the guardianship and conservatorship proceeding disqualifying him from representing Ruth Clinesmith.

46. [sic] Notwithstanding the Orders of July 18 of September 1, 2005, respondent continued to represent Ruth Clinesmith in the Moody Bible lawsuit and continued to purport to represent the interests of Bruce Clinesmith in that lawsuit as well.

47. [sic] On November 21, 2005, an Order was entered by the United States District Court in the Moody Bible suit disqualifying respondent from representing any party to that action for the same reasons that he was disqualified by Judge Vanzi in her Order of September 1 in the guardian and conservatorship proceeding.

48. [sic] By reason of the foregoing conduct respondent violated the following Rules of Professional Conduct:

a. Rule 16-102(D) by assisting a client (Ruth Clinesmith) to engage in conduct he knew was fraudulent or misleading to the court;

b. Rule 16-107(A) by representing Ruth Clinesmith whose interests were adverse to those of another client (Bruce Clinesmith).

c Rule 16-107(B) by representing a client (Bruce Clinesmith) where the representation of that client was materially limited by his representation of another client (Ruth Clinesmith);

d. Rule 16-109(A) by representing a person (Ruth Clinesmith) in the same or a substantially related matter in which that person's interests were materially adverse to those of a former client (Bruce Clinesmith) and without the consent of the former client;

e. Rule 16-301 by bringing a proceeding that was frivolous;

f. Rule 16-303(A)(2) by failing to disclose a material fact to a tribunal when the disclosure was necessary to avoid assisting a client in a fraudulent act;

g. Rule 16-303(A)(3) by failing to disclose to a tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client (Ruth Clinesmith) and not disclosed by opposing counsel;

h. Rule 16-401(B) by failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client;

i. Rule 16-402 by communicating during the representation of a client about the subject of the representation with a party he knew to be represented by another lawyer in the matter

without the consent of the other lawyer and without authorization of law to do so;

j. Rule 16-804(C) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

k. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice and

l. Rule 16-804(H) by engaging in conduct adversely reflecting on respondent's fitness to practice law.

FACTORS IN AGGRAVATION

49. [sic] Respondent was disciplined by the issuance of a Formal Reprimand on November 18, 2005 for substantially similar conduct involving a conflict of interest in violation of Rule 16-107(A) of the Rules of Professional Conduct. *ABA Standards For Imposing Lawyer Sanctions,* Standard 9.22(a).

50. [sic] Respondent has engaged in a pattern of misconduct constituting multiple offenses. *ABA Standards For Imposing Lawyer Sanctions.* Standard 9.22(d).

51. [sic] Respondent has refused to acknowledge the wrongful nature of his conduct, *ABA Standards For Imposing Lawyer Sanctions,* Standard 9.22(g).

52. [sic] Bruce Clinesmith, the person adversely affected by the conduct of respondent, is suffering from advanced dementia and was and continues to be

under the protection of a court appointed guardian. *ABA Standards For Imposing Lawyer Sanctions,* Standard 9.22(h).

53. [sic] Respondent has substantial experience in the practice of law. *ABA Standards For Imposing Lawyer Sanctions.* Standard 9.22(i).

54. [sic] The names and addresses of all witnesses to Count III presently known to the Disciplinary Board are:

James S. Goddard, Esq.
Citigroup Global Market
77 Water St., 9th Flr.
New York, NY 10005

Catherine S. Combs
c/o Nell Graham Sale, Esq.
PO Box 25687
Albuquerque, NM
87125-0687

Barbara J. Singer
c/o Nell Graham Sale, Esq.
PO Box 25687
Albuquerque, NM
87125-0687

Richard M. Reidy, Esq.
4010 Carlisle, NE
Albuquerque, NM
87107-4532

Spencer W. Reid, Esq.
201 Third St., NW
Albuquerque, NM 87102

Gregory W. MacKenzie, Esq.
10590 Second Street NW, #C
Albuquerque, NM 87114

Stuart L. Stein, Esq.
2155 Louisiana Blvd., NE
Ste. 2200
Albuquerque, NM 87110

One or more of these witnesses may be called telephonically.

It is expected that this matter will be prosecuted by Joel L. Widman, Deputy Disciplinary Counsel.

WHEREFORE, by reason of the foregoing, it is respectfully requested pursuant to Rule 17-309 NMRA 2004 that a hearing committee be designated to hear evidence and make findings of fact and recommendations to the Disciplinary Board and, if any fo [sic] the charges are sustained, that Respondent be disciplined and assessed costs of this proceeding.

Respectfully submitted,

/s/ Joel L. Widman

Joel L. Widman, Deputy
Disciplinary Counsel
PO Box 1809
Albuquerque, NM 87103-1809
505-842-5781

Date: Feb. 22, 2006

APPENDIX CC

THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Case No. 17,349

IN RE:

STUART L. STEIN, ESQ.,

An Attorney Admitted to the Bar of the
Supreme Court of New Mexico,

Respondent.

HEARING OF

DECEMBER 17 [sic], 2007

Appearances: Joel Widman, Esq., Disciplinary Counsel
Stuart L. Stein, Esq., Respondent

TAPE 1, SIDE A

[2] BAILIFF: The honorable Supreme Court of the State of New Mexico. Court is now in session.

CHIEF JUSTICE: Please be seated. We have one matter on the docket this afternoon in the matter of Stuart L. Stein. Case number 17,349. Joel Widman on behalf of the petitioner. He's asked for ten minutes only, and ten minutes rebuttal. Is that correct?

MR. WIDMAN: Yes sir, that is correct.

CHIEF JUSTICE: Mr. Stein, 20 minutes?

MR. STEIN: [Inaudible].

CHIEF JUSTICE: Okay. Proceed.

MR. WIDMAN: Good afternoon, Mr. Chief Justice. Justices, uh, my name is Joel Widman. I am at the office of, uh, disciplinary counsel. Uh, may it please the court. The purpose of discipline is stated in the preamble to the rules governing disciplinary three. The protection of the public. The protection of the profession. And the protection of the administration of justice. Whereas here, there is no real question of fact as to the conduct engaged in by the Respondent. The issue becomes what discipline is appropriate where the Respondent has failed to grasp any appreciation of how his conduct falls below the standard set for attorneys in this state, and continues to blame others for his acts and omissions. And shows disdain for the disciplinary system. In that regard, the statements that have been made by the Respondent in the course of this proceeding are relevant. Before the hearing committee in this case, the Respondent made the following comment. "I have been through this whole thing before this committee on the Boatrush case. "You," referring to the hearing committee, "gave me a 15-day [3] suspension. We go up on appeal, to the disciplinary board, they increase it to 90 days. We go to the Supreme Court, nothing. A slap on the wrist; a public reprimand. There is something wrong with the system." At the hearing on aggravation and mitigation in this case, the Respondent said, "but as far as mitigation concerned, I have done nothing wrong." And perhaps most telling is the

response that was made to the inquiry of Mr. Shucarage, the chair of the board panel hearing committee when he posed to the Respondent the following question.

Mr. Shucarage: "What did you get out of Judge Vanzi's letter that started this whole thing? That started this whole process as far as what you did wrong, according to her at least." Mr. Stein: "She just didn't like me. I was too tough." Mr. Shucarage: "Is that what her letter said?" Mr. Stein: "No, you said, what did I get out of it?" Whereon, Mr. Shucarage continues: "Do you still take the position that you have done nothing that violates the rules of professional responsibility?" Mr. Stein: "Absolutely. Absolutely. You know if the answer to practicing law to avoid disciplinary counsel is to make all close decisions against your client and for the other side so nobody complains, then I don't want to practice law anymore."

This court has dealt with a similar attitude in the case of *Elias Quintana*. In that case, this court stated, "Rather than recognizing his own shortcomings, he continues to blame others for his acts and omissions. Quintana's sustained inability to grasp any appreciation of how his conduct falls below the standards set for attorneys, or any understanding of his professional obligations, convinces us that an extension of the previously imposed sanction is required for the protection of the public." And Mr., uh, Quintana, uh, as this court, I recollect, [4] was suspended indefinitely.

Finally, I would like to refer to Mr. Stein's website. That has been introduced in evidence as Exhibit "D," at the hearing on aggravation and mitigation. The first paragraph is captioned, hearing committee needs help diagramming sentences. Judge Vanzi's cut and running accusations – judicious or cowardly? Disciplinary counsel's office drags feet on bar complaint filed against their lap dog lawyer. Referring to Greg McConsey who was a witness, uh, for, uh, disciplinary counsel, uh, in this matter. Want a lifetime appointment to a hearing committee? Call Virginia. This, unfortunately, is the mental state that we are dealing with. And there is no discipline short of disbarment that is going to accomplish the objectives that are set out in the preamble. To protect the public. To protect the profession, or to protect the administration of justice. Anything short of that is going to enable the Respondent to walk out of here, uh, thinking that he was unjustly dealt with, which is no doubt going to happen regardless of what this court does, but enable him to go back to the practice of law ultimately, and continue on the same course of conduct that he has embarked on and continued without remorse. And it is, uh, our request that this court, uh, put a stop to it now by disbarring Mr. Stein permanently.

JUSTICE: Counsel, uh, what did the hearing committee recommend, as opposed to the hearing panel?

MR. WIDMAN: Uh, the hearing committee recommended a six-month suspension.

JUSTICE: Do you know why? There's a big difference between that and what was recommended by the board. Do you know why?

MR. WIDMAN: I'm sorry?

[5] JUSTICE: Do you know why they recommended, uh, the six-month suspension as opposed to the disbarment that you've been seeking?

MR. WIDMAN: Uh, no I don't.

JUSTICE: Okay.

JUSTICE: The panel was five years, right?

MR. WIDMAN: The panel was, uh, a five-year, uh, a minimum five-hear [sic] disbarment, yes.

JUSTICE: And the other was six months. What do you, what do you propose that we do given this disparity, between the two bodies?

MR. WIDMAN: Well, I, I think, and I, I can only speculate as to, uh, in response to your question and Justice Daniel's question. Uh, I, I think that at the hearing committee level, uh, particularly, uh, in response to the question, uh, that was posed by Mr. Shucarage. I think it became painfully aware to the hearing committee that, uh, there was no grasp on the part of the Respondent as to, uh, the seriousness of his conduct, the gravity of his conduct. Uh, how his conduct impacted the administration of the case. And when he said what I got out of Judge Vanzi's letter is that she just didn't like me because I'm too tough, I think that set it off, and I think that the hearing

committee, uh, at, at that point, uh, probably gave that great weight. I think there's another factor, and that is the hearing committee in this case did something that I've never seen done before. Uh, and that is in the course of, uh, oral argument, uh, Mr. Fish went through every allegation, uh, uh, I'm sorry, every finding of fact that was made by, uh, the, uh, hearing, uh, committee, and asked Mr. Stein whether or not he agreed with it. And as a result of his responses to those questions, the hearing committee concluded that there is really no issue of fact in this case, uh, and one can see that [6] by, uh, by looking at the briefs he filed. His briefs are, are primarily an attack on the system of disciplinary counsel, uh, on everybody in sight. But there is nothing, uh, in the, uh, briefs that Mr. Stein filed either before this court or before the hearing panel, uh, that addresses the substantive issues. And in fact, uh, he can't address the substantive issues because it's kind of, it's a matter of record, all of the conduct, uh, that he is, uh, that forms the basis for the discipline that's been imposed in this case, was conduct, uh, it's a matter of record in the proceeding before Judge Vanzi.

JUSTICE: But the hearing committee recommended six months.

MR. WIDMAN: That's correct.

JUSTICE: And subsequently the board recommended a minimum of five year disbarment. Is that because you just had different human beings looking at the same matters, and coming up with

different conclusions, or did something happen the, in the interim that made the board inclined to believe that something stiffer was required?

MR. WIDMAN: I'm not aware of anything that happened in the interim. Uh, I think that, uh, uh, the hearing panel, that's opposed to the hearing committee, uh, probably had more time, uh, to reflect on the exhibits, particularly, uh, uh, Exhibit "D," which was a copy of, uh, the Respondent's website, and again, I'm, I'm simply speculating here. Uh, and I, I believe that, uh, they had more time than the hearing committee to look at it, and to give it weight. Uh, and I think again it was the answers that, uh, uh, that were posed to Mr. Stein by the hearing panel that were not posed to him by the hearing committee.

JUSTICE (FEMALE): And I just have one question, were there any mitigating circumstances found by either of the, uh, either the panel or the [7] committee?

MR. WIDMAN: Uh, no, I don't think there were.

CHIEF JUSTICE: Thank you, Mr. Widmann Mr. Stein?

MR. STEIN: Thank you. Mr. Chief Justice, Justices of the Supreme Court, may it please the court. Uh, because I thought I would have opening and closing as to the last time that we were here with my other lawyer, I was a little disjointed because of this middle part. So what I propose to do is respond to

what Mr. Widman said, and then go into my presentation. Uh, uh, Mr. Widman is quoting from the record about what happened at the hearing committee, and what we were trying to do was remind the hearing committee that the last time, on the Boatrush case, that they gave 15 days. It then went to 90 days. And then this court said it was a, uh, public reprimand. What I was trying to show to them was that they were looking at what I did much more severely than this court did. And I was trying to show that there was really no proof of anything at this particular case. Mr. Widman says that I said that I did nothing wrong. I did say that. I say that to this court. There was nothing proved. There was nothing alleged. All we have are conclusions based on facts. I filed two federal lawsuits on behalf of my clients. I represented them in a guardianship, a conservatorship matter, and everybody said you're not allowed to do that, and therefore you have a conflict of interest, but no one ever articulated the conflict of interest. And all of the other things that were said, as I'll get into in my, uh, uh, presentation, were just not true.

JUSTICE: Are you saying that there was no conflict of interest, or that they just didn't sufficiently allege conflict of interest?

MR. STEIN: Well, if we look at the record, they didn't prove it. If we, if you're asking me, Justice Daniels, was there a conflict of interest, the answer is [8] no. And there wasn't. Uh, the, uh, other things that were, uh, said here, uh, that were quoted, that Mr. Shucarage said to me, well, you've read Judge

Vanzi's letter. What is your reaction? And I said, "I don't think Judge Vanzi likes me." And the proof of that pudding is that, and this came out before the hearing committee. When the issues came up about what happened in the Clinesmith matter, and there was a hearing on less than 24 hours notice. We all have to run to court. And the judge, Judge Vanzi, starts interrogating me. Starts questioning the lawyers from the other side, and then I say to Judge Vanzi, "But judge, you haven't heard the other side yet." And her quote in the record is, "I don't need to hear the other side." When I'm before a judge who will say on the record they don't have to hear the other side, that includes my client's position, and this particular place, ca-, particular case and instance, my position, I find that is not appropriate. And that indicates to me a personal animus by the judge against either me or my client. The court should also take into consideration that when Judge Vanzi's letter was written, she was still sitting on that guardianship case. She has not yet ruled. Yet, she has spent, I think, I look at that letter, and if I had to do that letter on someone else, I would have spent at least a day, maybe longer, to put it all together, with all the backup material that she presented, to disciplinary counsel, and she's doing this while she is sitting as the judge on my client's case after she threw me off.

When I say, when Mr. Widman complains I did nothing wrong, I did nothing wrong. I'm concerned when an officer of the State of New Mexico gets upset

because a lawyer has a website. I do complain. And I make it public. I'm not worried about the public coming in and seeing it. At the hearing committee, we had, for most of the presentation, a reporter, from the Albuquerque Journal.

* * *

[19] filed the lawsuit did have jurisdiction. And, uh, I submit that these are not only inconsistent arguments, but the fact is that this is not *in rem* proceeding. It's an *in personem* proceeding, and the individual that had, uh, the authority over these trusts was Bruce Clinesmith, and then by implication, the guardians. And they are located in New Mexico, and Judge Vanzi did have jurisdiction, and his attempt two months after the guardianship and conservatorship proceeding was started, uh, to in effect end run Judge Vanzi's jurisdiction is, is simply that. Uh, he wasn't getting the relief that he thought he would get, as fast as he thought he would get it, so he runs into federal court, under a power of attorney. Uh, under, uh, uh, a purported power of attorney, and asks the federal court to void the trust, and to in effect pay the proceeds, uh, or, uh, put the proceeds, uh, within the control of, uh, Ruth Clinesmith. Uh, and his entire course of conduct from not advising the federal court to continuing to represent Bruce Clinesmith in the federal proceeding, uh, after he was disqualified, to continue to represent Ruth Clinesmith in the federal proceeding after he was disqualified until finally November, the federal court disqualified him, realign the parties, and dismiss the lawsuit for lack of

diversity jurisdiction. And that's how that case wound up. But, uh, uh, his conduct has been repre-, reprehensible. Uh, there is no question that, uh, Mr. Stein, uh, should not be practicing law in New Mexico.

CHIEF JUSTICE: Thank you, Mr. Widman.

MR. WIDMAN: Thank you.

CHIEF JUSTICE: The court will retire, and deliberate this case. If we are able to reach a resolution, we will return to open court and announce our decision. I ask that you remain very near the courtroom. Uh, we, if we are unable to reach a resolution today, we will let the clerk know, and the clerk will, uh, let [20] you know that the matter will be taken under advisement.

BAILIFF: [inaudible].

CHIEF JUSTICE: Please be seated. The court has deliberated. And have reached a unanimous decision in this case. Mr. Stein, it is the decision of the court unanimously to disbar you effective immediately. You may seek reinstatement pursuant to the provisions of 17-214. You must comply with the provisions of rule 17-212, with respect to the notification of clients and pending matters, and there are details in that rule which will specify exactly how you go about doing that in litigated matters and any matters, uh, with respect to unauthorized practice of law. How to do affidavits of compliance, etcetera. You are responsible for the costs of these proceedings. The court has found, uh, that the findings are supported

by sufficient evidence. And we will write in this case to explain our findings and conclusions. But in summary, when a lawyer represents two clients, one who may have advertised or at least acknowledged he is potentially if not clearly incapacitated, seeking to take money from them, find in favor of the other client, there is a conflict of interest. To ignore the judge's order, whether you agreed with it or disagreed with it, is impermissible. We have avenues that are available to litigants who disagree with a judge's order, and that is something that you should have availed yourself of. But simply refusing to honor the judge's order is a problem. Uh, seeking to have a client who has a guardian to re-write the will, to undo any of the trust provisions is also a conflict. And a violation of codes. So your disbarment is effective immediately. And the court will, as I say, publish an opinion in this case.

MR. STEIN: Will the court consider a 30-day situation where I can [inaudible] up certain matters in the courts that I have for pending clients?

* * *

APPENDIX DD

BEFORE THE DISCIPLINARY
BOARD OF THE SUPREME COURT
STATE OF NEW MEXICO

IN THE MATTER OF: Disciplinary No. 02-2006-505

STUART L. STEIN, ESQ.

HEARING
July 30, 2007
9:20 a.m.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico

BEFORE:

MR. WILLIAM G. SHOOBRIDGE, Board Panel Chair
Paul M. Fish, Board Panel Member
David S. Campbell, Board Panel Member

REPORTED BY: Sally Peters, RPR, CCR 57
Bean & Associates, Inc.
Professional Court Reporting Service
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

(4554A) SP

* * *

[25] Well, you never told me I couldn't.

Well, you know that is essentially what we are dealing with here. We are dealing with somebody that cannot take responsibility for what he does in the course of his practice. Everything is somebody's else

fault, and all you have to do is look at his website. It's my fault, its Judge Vanzi's fault. Everybody is out to get him, and there is no focus, by the respondent on what he did, what was wrong with what he did, and how he might change his behavior so he avoids situations like this in the future. And that is why we are basically arguing that he should be disbarred, because discipline does not have an effect here. And that's essentially our case.

MR. SHOOBRIDGE: Thank you, Mr. Widman. Mr. Stein.

MR. STEIN: Thank you, Mr. Chairman.

I want to respond in a little disjointed. Mr. Fish mentioned something about the Bogarosh case that came up. The original hearing committee recommended a 15 day suspension. When it got to the review panel, they increased it to 90 days. Originally discipline counsel asked for a one year suspension before the committee. At the review panel, they asked for six months, and then when we

* * *

[73] specificity, part of a fraud complaint would be the misrepresentation. If the misrepresentation could stand as an independent violation of the rules of professional conduct, I would have been on notice, but I wasn't on notice.

And then as far as the prosecutorial misconduct, I think those matters speak for themselves. Even today, Mr. Widman talks about my website. You can

go to my website. I haven't heard anyone say that the things that were on the website were untrue.

The question about 45-5-402, there was nothing, nothing in Judge Vanzi's letter that mentioned that statute. It was heard in the hearing committee that Judge Vanzi was told about that by Mr. MacKenzie, and Judge Parker was told about that statute by Mr. Reid, and neither of those judges did anything about it, because they agree, I think, with me, that it had no application.

MR. SHOOBRIDGE: Okay. Thank you, Mr. Stein. I'm going to move now to Mr. Widman, and we will come back to you here shortly.

MR. CAMPBELL: You up for a break?

MR. SHOOBRIDGE: Yes. Let's take a five minute break.

* * *

APPENDIX EE

BEFORE THE DISCIPLINARY BOARD OF
THE SUPREME COURT OF THE
STATE OF NEW MEXICO

In Re: STUART L. STEIN, ESQ. An Attorney Licensed to Practice before the Courts of the State of New Mexico, Respondent.	Disciplinary No. 02-2006-505

HEARING TO CONSIDER MATTERS
IN AGGRAVATION AND IN MITIGATION

TRANSCRIPT OF PROCEEDINGS

April 2, 2007
9:08 a.m.
Law Offices of Shapiro, Bettinger and Chase, LLP
7411 Jefferson Street, NE
Albuquerque, New Mexico

COMMITTEE CHAIR:	Robert P. Tinnin, Esq.
PANEL MEMBERS:	Gregory W. Chase, Esq. Carolyn Tinker
REPORTED BY:	Paul Baca, CCR No. 112 Paul Baca Court Reporters 500 Fourth Street, NW – Suite 105 Albuquerque, New Mexico 87102

* * *

[16] involving Virginia Ferrara that happened 18 years ago.

And there is no glimmer here of any recognition that anything that the Respondent did may even have been inappropriate. There's just none. Everything that happened is everybody else's fault. There's no responsibility for his own conduct.

And this is evident by his Web site. And this is a printoff of his Web site, dated March 12th, 2007. And this is a matter that the Supreme Court takes very seriously.

And I think the best language is In The Matter of Quintana, 104 NM 511, in which they state, "Rather than recognizing his own shortcomings, he," the respondent, "continues to blame others for his acts and omissions. In addition, he has openly chastised Disciplinary Counsel and this Court for what he evidently perceives is unjustified punishment. Our purpose in disciplining Quintana or other attorneys is not to impose punishment. Our obligation is to protect the public and the reputation of the profession and safeguard the administration of justice. Quintana's sustained inability to grasp any appreciation of how his

* * *

[22] Because how is anything less than that going to protect the public? And I think the answer is, it's not. And all one has to do is read through the Respondent's Web site to be convinced of that.

You know, neither Virginia Ferrara nor I nor anybody on this hearing committee nor Judge Vanzi

told the Respondent to prepare a will and go down to the nursing home and have Bruce Clinesmith sign it. But somehow or other, now that that conduct has become the subject of a disciplinary proceeding, it's everyone else's fault.

And it's that kind of a mindset that is impossible to deal with by progressive discipline. It just doesn't work.

The cases that we feel are appropriate are Matter of Arrieta, 105 NM 418 –

CHAIRMAN TINNEN: 418?

MR. WIDMAN: 418. And in that case, the respondent was disbarred because his conduct was found to be willful and deliberate and as a result of negligence.

Matter of Quintana, which I previously cited at 104 NM 511. The Matter of C'deBaca, 109 NM 151, and the Matter of Chavez, 122 NM 504. Chavez did not involve disbarment. It involved an

* * *

[40] can't have a house.

And Mr. Widman says I'm too aggressive, that I go into Federal Court. Probably just one lawyer in 50 would even know how to get there.

I've had cases in over 25 states all over this country, criminal and civil. I think I know what I'm doing.

Mr. Widman has into evidence my blog. What I write there I believe is true. I'm not allowed to do it because my First Amendment rights don't count, not as far as Discipline Counsel is concerned.

I'll tell you what I should never be. I should never be a judge. I should never be Discipline Counsel. I have some marks against me, but that doesn't mean I should be disbarred. If it does, I'm out of the state. You'll be rid of me.

I don't think in a million years would the State of Florida take away my license. Because as soon as I tell them I have no discovery, they will disregard this. And then unfortunately, the state that I love will be considered, at least by the Florida Supreme Court, a state where due process doesn't live.

In my opinion, it didn't live in this

* * *

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(2)

No. 07-1442

FILED
JUL 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

STUART L. STEIN, ESQUIRE,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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RESPONSES TO QUESTIONS PRESENTED

1. The First, Fifth, and Fourteenth Amendments do not prohibit the use of Petitioner's relevant website statements as evidence during the degree of discipline stage of a lawyer disciplinary proceeding for the purpose of evaluating the Petitioner's willingness to accept responsibility for his misconduct. *In re Kramer*, 282 F.3d 721 (9th Cir. 2002); *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983); *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). Further, Petitioner failed to properly preserve this issue during the Hearing Committee proceeding and in the New Mexico Supreme Court.

2. 3. 4. Petitioner received adequate notice of the charges against him and received an adequate opportunity to respond by cross-examining witnesses and throughout an eight-day evidentiary hearing, all as ultimately determined by the New Mexico Supreme Court. Thus, Petitioner received adequate due process under the Fifth and Fourteenth Amendments, especially where Petitioner was not surprised by the introduction of any evidence and has never identified any fact ultimately determined that was not supported by the evidence or which caused him prejudice because of a lack of discovery.

5. New Mexico's application of a preponderance of the evidence standard in disciplinary proceedings violates no Constitutional provision. Further, Petitioner failed to preserve this issue.

TABLE OF CONTENTS

	Page
Responses to Questions Presented	i
Table of Contents	ii
Table of Appendices	iii
Table of Authorities	v
Statement of the Case	1
Reasons to Deny Writ	14
I. NO DUE PROCESS RIGHT HAS BEEN INFRINGED WHERE PETITIONER WAS PROVIDED NOTICE OF THE CHARGES AGAINST HIM AND AN ADEQUATE OPPORTUNITY TO RESPOND	15
A. The Admission Of Petitioner's Website Pages Without Objection Is Not A Due Process Violation	17
B. Petitioner Was Made Fully Aware Of The Charges Against Him And Which He Was Found To Have Violated	19
C. The Specification Of Charges Set Forth The Allegations Of Petitioner's Misrepresentations, Finding Of Misrepresentation And Fraud Such That Petitioner Did Not Require Further Notice Or Discovery	21
D. Petitioner Had Available To Him The Discovery Tools Necessary To Afford Him Due Process	23

TABLE OF CONTENTS – Continued

Page

E. The Standard Of Proof In New Mexico Disciplinary Proceedings Is A Preponderance Of The Evidence 24

II. FIRST AMENDMENT RIGHTS WERE NOT IMPLICATED BECAUSE PETITIONER WAS NOT DISCIPLINED FOR HIS STATEMENTS 26

Conclusion 29

TABLE OF APPENDICES

A. Complaint letter dated September 21, 2005 ..... App. 1

B. September 22, 2005 letter from Chief Disciplinary Counsel Virginia Ferrara ..... App. 19

C. October 11, 2005 Stein correspondence .... App. 21

D. Rule 17-309 ..... App. 23

E. Specification of Charges; *see* ¶ 36, 42, and 46 of the Specification of Charges ..... App. 27

F. Rule 17-310 A ..... App. 40

G. Answer ..... App. 42

H. Orders of April 25, 2006 ..... App. 56

I. June 22, 2006 Order ..... App. 62

J. Rule 17-311 ..... App. 65

K. August 24, 2006 letter of Deputy Disciplinary Counsel ..... App. 66

TABLE OF CONTENTS – Continued

Page

L. Re *In the Matter of Stein*, 177 P.3d 513 (2008) at ¶ 57 ..... App. 68

M. Petition for Extraordinary Writ ..... App. 111

N. TR 12 April 2, 2007 ..... App. 120

O. TR 16-17 April 2, 2007 ..... App. 122

P. TR 14-19 April 2, 2007 ..... App. 125

Q. TR 4-6 July 30, 2007 ..... App. 131

R. TR 56-76 July 30, 2007 ..... App. 135

S. Review Panel's Order and Decision ..... App. 154

T. TR 19 December 19, 2007 ..... App. 160

U. TR 33 April 2, 2007 ..... App. 162

V. TR 105 July 30, 2007 ..... App. 164

W. TR 10-11 December 19, 2007 ..... App. 166

X. Preface N.M. Rules of Discipline ..... App. 169

Y. Rule 17-306 (B) ..... App. 171

TABLE OF AUTHORITIES

Page

CASES:

Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) 25, 26

Alexander v. Pathfinder, Inc., et al., 189 F.3d 735 (8th Cir. 1999) 16

Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968) 27

Beef Nebraska, Inc. v. United States, 807 F.2d 712 (8th Cir. 1986) 16

Chimielinski v. Commonwealth of Mass. Office of the Commissioner of Probation, 513 F.3d 309 (1st Cir. 2008) 16

In re Fletcher, 424 F.2d 783 (8th Cir. 2005) 16

Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) 17

Kelly v. EPA, 203 F.3d 519 (7th Cir. 2000) 16

Koenigsburg v. State Bar, 366 U.S. 36 (1961) 17

In re Kramer, 282 F.3d 721 (9th Cir. 2002) 19, 27

Lopez v. Las Cruces Police Department, 2006-NMCA-074 ¶6, 139 N.M. 730, 137 P.3d 670 28

New York Times v. Sullivan, 376 U.S. 967, 84 S. Ct. 1130, 12 L. Ed. 2d 83 (1964) 17

O'Neill v. Baker, 210 F.3d 491 (1st Cir. 2000) 16

In re Quintana, 104 N.M. 511, 725 P.2d 220 (1986) 9

TABLE OF AUTHORITIES – Continued

Page

In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) 24, 25

In re Matter of D'Angelo, 105 N.M. 391, 733 P.2d 360 (1987) 11, 25

In the Matter of Stein, 2008-NMSC-513, 177 P.3d 513 ..... *passim*

Theard v. United States, 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957) 15

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 323 (1970) 25

Wisconsin v. Mitchell, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1983) 26

Wolfley v. Real Estate Commissioners, 100 N.M. 187, 668 P.2d 303 (1983) 27

RULES:

17-306(B) NMRA 23

17-309 NMRA 3

17-310 NMRA 4

17-311 NMRA 5

OTHER AUTHORITIES:

New Mexico Supreme Court Order 06-8300-32, effective January 15, 2007 5

STATEMENT OF THE CASE

The investigation stage of this attorney discipline matter began with a complaint by a New Mexico State District Court Judge against Petitioner, asserting facts which the Judge believed to be violations of the Rules of Professional Conduct:

- representing two clients with adverse interests;
- continuing to meet with and obtain signed documents from a person (without the presence of the person's temporary guardian and guardian ad litem) after the Court had disqualified the attorney from representing that person;
- continuing to represent the interests of a separate client in a matter substantially related to and adverse to the interests of a prior client; and
- in making misrepresentations to obtain a settlement and to a Court

(*see* complaint letter dated September 21, 2005, attached as Appendix A). Notably, Petitioner was counsel of record in all proceedings referred to by the Judge in the Complaint and had participated in all relevant hearings and matters to which the complaint referred. Petitioner never disputed that he engaged in the conduct complained of, almost all of which is a matter of public record. Petitioner was provided a copy of the complaint on September 22, 2005. (*See*

September 22, 2005 letter from Chief Disciplinary Counsel Virginia Ferrara attached as Appendix B).

After receipt of the complaint, Petitioner was given a fair opportunity to present his "side of the controversy" before any further proceeding. Instead of responding on the merits, Petitioner refused to respond unless he was provided concessions to which other New Mexico attorneys receiving complaints are not entitled, including the ability to engage in discovery without a "showing of need" and to take the unfettered deposition of a sitting District Court Judge during an ongoing proceeding, even though at that point no decision had been made to institute formal charges and no one, including the complaining Judge, had been identified as a witness. (*See* October 11, 2005 Stein correspondence, attached as Appendix C).

There is no mechanism or rule that permits an attorney in New Mexico to condition his or her cooperation on concessions geared toward obtaining more favorable treatment of his or her case from Disciplinary Counsel. Disciplinary Counsel properly rejected Petitioner's request for special favors and for the concessions Petitioner requested as a prerequisite to his cooperation.

Although Disciplinary Counsel had the right and ability to engage in some formal discovery during the investigative stage, no formal discovery was had. There was therefore, no disparity in this case between Disciplinary Counsel's and Petitioner's formal discovery.

Following the investigation stage, Disciplinary Counsel initiated formal disciplinary proceedings against Petitioner by the filing of a Specification of Charges with the chair of the Disciplinary Board. (*See* Rule 17-309 attached as Appendix D and Specification of Charges attached as Appendix E). As required by rule, the Specification of Charges included a brief and plain statement of the charge(s) of professional misconduct, the provision(s) of the rules, statutes or other laws claimed to have been violated, the names and addresses of all known witnesses against the attorney, all known factors in aggravation, and the name and address of the particular Disciplinary Counsel who was expected to prosecute the matter. (*See* Rule 17-309 attached as Appendix D and Specification of Charges attached as Appendix E). The Specification of Charges as to Petitioner: 1) identified twelve separate Rules of Professional Conduct Petitioner allegedly violated; 2) provided twenty-four (24) allegations of fact; and 3) concluded with a paragraph that tied the allegations of violative conduct to the specific Rules of Professional Conduct believed to have been violated. (*See* Specification of Charges ¶¶ 3-48 attached as Appendix E). The specification also identified five (5) factors in aggravation and identified seven (7) witnesses. The initial complaining Judge was not listed as a witness by Disciplinary Counsel.

By rule, Petitioner was permitted twenty days to file an answer to the Specification of Charges and had the right and opportunity to provide "any other

relevant and material matter" concerning the factual charges. The rules also required Petitioner to admit or deny the charges, to provide any matter in mitigation, and to identify witnesses. (*See* Rule 17-310 A attached as Appendix F). Petitioner chose not to comply with the rules and never provided any relevant material or evidence he believed were omitted from the charges or that could explain his conduct. He also failed to designate any "matter in mitigation." (*See* Answer attached as Appendix G). Petitioner finally served his Answer on July 3, 2006, four months after service of the Specification of Charges and less than two months from the date set for the hearing on the merits. By serving mere denials and providing no relevant material (or evidence of matters omitted by the charges), Petitioner failed to avail himself of one of his opportunities to be heard. Instead, in the four months between the filing of the Specification of Charges and the Answer, Petitioner filed two challenges to the appointed Hearing Committee and a Motion to Dismiss Specification of Charges or for a More Definite Statement. Both the first Challenge to Appointed Panel and the Motion to Dismiss preemptively requested relief based on Petitioner's disagreement with the rules pertaining to discovery in disciplinary proceedings. Petitioner apparently objected to the requirement of a showing of need before he would be permitted to engage in formal discovery. As of that point, Petitioner had not made a single request for discovery as provided in the rules. Those motions were responded to, Petitioner

had an opportunity to reply, and after due consideration, the Motions were denied as unmeritorious. (*See* Orders April 25, 2006 attached as Appendix H and June 22, 2006 attached as Appendix I). Petitioner does not now challenge the propriety of those Orders, nor does he claim that either of those Orders prejudiced him in any way in the proceedings.

On the same day Petitioner filed his Answer, he made a general request to engage in discovery pertaining to Disciplinary Counsel's investigation but without providing any specific request pertaining to the charges. (*See* Petitioner's Request for Discovery Appendix V to the Petition). Petitioner also requested to take the depositions of all witnesses. The Rules Governing Discipline provide that either party may apply for permission to conduct discovery prior to a formal hearing. Upon a "written showing of need" the chair may permit discovery upon such terms as may be appropriate under the circumstances. (*See* Rule 17-311 attached as Appendix J).[1] Instead of submitting discovery requests in anyway tailored to the facts presented in the Specification of Charges or outlining any fact about which he lacked knowledge or information, Petitioner argued that he wanted wide-ranging discovery. As such, Petitioner's requests for discovery lacked the specificity and clarity necessary

[1] The rule has subsequently been amended, replacing the words "written showing of need" with "showing of good cause" by New Mexico Supreme Court Order 06-8300-32, effective January 15, 2007.

to meet the required showing and to justify the discovery as necessary.

Notably, there was no recommended finding of fact suggesting any conduct of Petitioner, nor any section of the Rules of Professional Conduct Petitioner was found to have violated, that were not included in the Specification of Charges. Even though Petitioner now argues that Court Orders he was alleged (and now found) to have violated were *not* identified in the Specification of Charges, they are clearly referenced and identified. (*See* ¶¶ 36, 42, and 46 of the Specification of Charges attached as Appendix E). Thus, Petitioner was made aware of all conduct and each alleged violation of Rule that was at issue in Petitioner's formal evidentiary hearing.

The evidentiary hearing on whether Petitioner violated the Rules of Professional Conduct occurred over a period of several months, with portions of the hearing held on August 28, 29, and 30, 2006, November 16 and 17, 2006, December 18, 2006, and January 23, 2007. On the first day of the hearing, the Hearing Committee bifurcated the proceedings, deciding to hear matters pertaining to violations of the Rules of Professional Conduct first and subsequently hearing matters in aggravation and mitigation at a later degree of discipline hearing, if necessary. The latter hearing occurred on April 2, 2007 after the Hearing Committee found that Petitioner did violate the Rules of Professional Conduct.

Prior to the first day of the formal hearing, Petitioner was provided documents relating to the alleged violations. (*See* August 24, 2006 letter of Deputy Disciplinary Counsel attached as Appendix K). In addition, Disciplinary Counsel provided to Petitioner all exhibits Disciplinary Counsel was going to offer into evidence at the violations portion of the hearing. The New Mexico Supreme Court found that Petitioner had received the entire Disciplinary Board file prior to the hearing (*In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513 at ¶57 Appendix L). At the hearing, Petitioner cross-examined all seven (7) witnesses called by Disciplinary Counsel. Petitioner did not object to any of the exhibits ultimately offered by Disciplinary Counsel which were then admitted. Petitioner offered his own exhibits and called five (5) witnesses as a part of his defense.

Subpoenas were issued by the Chair of the Hearing Committee at the request of the Petitioner for witnesses including the District Court Judge, Chief Disciplinary Counsel, Deputy Disciplinary Counsel (prosecuting the case), and another Deputy Disciplinary Counsel (regarding a separate disciplinary matter against Petitioner).

Petitioner sought and received what amounted to a pre-decision interim review of the Hearing Committee's Orders denying discovery when, after several days of hearing but before the hearing concluded, he filed a Petition for Extraordinary Writ and Emergency Request for Stay in the New Mexico Supreme Court. The contents of the Petition are instructive

because, again, Petitioner failed to in any way demonstrate why the requested discovery was needed or to outline the subject matter of the proposed discovery. Petitioner even failed to make the minimal showing required in a civil case that the discovery sought was relevant to the subject matter involved in the pending matter. (*See* Petition for Extraordinary Writ attached as Appendix M). Petitioner's arguments that he was denied discovery because he was not provided discovery *he* thought was appropriate, without regard to need or relevance, were raised before the New Mexico Supreme Court in this predecision review. Petitioner's writ was denied and his claims were rejected, as the Court later stated in its opinion. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d at 526, ¶56.

At the conclusion of the violations portion of the hearing, the Hearing Committee rendered its findings and conclusions except as to matters in aggravation and mitigation, and except as to its recommendation as to discipline. Because the Hearing Committee found Petitioner's conduct to be violative of the Rules of Professional Conduct, it later conducted the bifurcated portion of the hearing to consider matters in aggravation and mitigation, on April 2, 2007. During that hearing Disciplinary Counsel introduced evidence of two prior disciplinary proceedings against Petitioner, one in Florida and one in New Mexico, and introduced evidence of Petitioner's refusal to acknowledge the wrongful nature of his conduct. Disciplinary Counsel characterized Petitioner's defense to

the charges as essentially to "lash out at everybody in sight." As evidence that Petitioner did not take responsibility for his own conduct, Disciplinary Counsel indicated that "this is evidenced by his website." Portions of Petitioner's website were offered at the hearing on mitigation and aggravation.

Petitioner did no discovery on the matters in aggravation (*See* TR 12 April 2, 2007 attached as Appendix N). Petitioner voiced no objection to the introduction of printouts of his website on First Amendment or any other grounds before the Hearing Committee. Disciplinary Counsel argued the propriety of the use of evidence about Petitioner's failure to accept responsibility by likening Petitioner's failure to accept such responsibility to that of another lawyer, Mr. Quintana, in a case previously decided by the New Mexico Supreme Court, *In re Quintana*, 104 N.M. 511, 513-14, 725 P.2d 220, 222-23 (1986), as follows:

> "Rather than recognizing his own shortcomings, he continues to blame others for his acts and omissions. In addition, he has openly chastised Disciplinary Counsel and this Court for what he evidently perceives is unjustified punishment. Our purpose in disciplining Quintana or other attorneys is not to impose punishment. Our obligation is to protect the public and the reputation of the profession and safeguard the administration of justice. Quintana's sustained inability to grasp any appreciation of how his conduct falls below the standard set for attorneys or

> understanding of his professional obligations convinces us that an extension of the previously imposed sanction is required for the protection of the public."

(*See* TR 16-17 April 2, 2007 attached as Appendix O). Disciplinary Counsel also argued two other factors to consider in aggravation, the first being the vulnerability of the victim(s), and the second, the fact that Mr. Stein had been practicing for a substantial time. (*See* TR 14-19 April 2, 2007 attached as Appendix P).

After the hearing on matters in aggravation and mitigation, the Hearing Committee sent its recommended findings and conclusions to the Disciplinary Board Hearing Review Panel (hereinafter Review Panel) on April 4, 2007. Both Disciplinary Counsel and Petitioner requested oral argument and briefing. The Review Panel provided a briefing schedule and held oral argument on July 30, 2007.

Although one of the charges included fraud as a potential element, none of the recommended findings of the Hearing Committee approved and adopted by the Review Panel included any finding of fraud. In fact, Petitioner agreed that any fraud claim was out of the case prior to the Review Panel hearing. (*See* TR 4-6 July 30, 2007, as Appendix Q). As a result, there was no requirement that Disciplinary Counsel prove any claims against Petitioner by more than a preponderance of the evidence.

New Mexico law indicates that the standard of proof in an attorney disciplinary proceeding is proof

by a "preponderance of the evidence." *In the Matter of D'Angelo*, 105 N.M. 391, 733 P.2d 360 (1987), cert. denied, 479 U.S. 1065 (1987). Petitioner did not challenge the standard of proof at the Hearing Committee, Review Panel, or in the New Mexico Supreme Court and any issue about the standard of proof has not been preserved.

Petitioner did raise at the Review Panel his failure to be provided any discovery. The Review Panel questioned Petitioner at length about any issue in the findings that were not supported by the evidence or for which he was not provided discovery such that he was prejudiced. Petitioner pointed out no evidence that was a surprise and could point to no prejudice. (*See* TR 56-76 July 30, 2007 attached as Appendix R). Petitioner was asked:

> "Paragraphs 1 through 29, (referring to paragraph of the hearing committees recommended findings) if you could identify specifically the ones that are not supported or that you are prejudiced because there wasn't discovery and somehow you would have proved something different."

(*See* TR 56-57 July 30, 2007 attached as Appendix R) (Parenthetical added). The Review Panel thereby assured itself that Petitioner was provided adequate notice of the charges against him and had been provided an adequate opportunity to respond to the charges. There simply was no recommended finding that additional discovery would have impacted. There was no prejudice to Petitioner.

The Review Panel Order in its "Decision of the Hearing Panel" adopted the Hearing Committee's findings and conclusions. The Review Panel recommended to the New Mexico Supreme Court that Petitioner be disbarred for no less than five (5) years. (Review Panel's Order and Decision attached as Appendix S).

The New Mexico Supreme Court heard argument on the Decision of the Hearing Panel and its recommendations on December 19, 2007. Again, Petitioner raised and had reheard his argument that he had received no discovery in response to his general requests unsupported by a showing of need. Once again Petitioner was asked "Was there anything at the hearing that surprised you, in terms of not knowing of its existence before?" In response to the Supreme Court, Petitioner admitted, "I don't think so, but I didn't know what the impact was." (TR 19 December 19, 2007 attached as Appendix T).

The New Mexico Supreme Court published its decision on February 20, 2008. *In the Matter of Stein*, 2008-NMSC-013, 117 P.3d 513. The New Mexico Supreme Court decision makes clear that Petitioner was *not* denied due process. While the due process claims raised in the Petition in this Court are somewhat different, the New Mexico Supreme Court dealt with each of the due process arguments then raised by Petitioner. The Court addressed Petitioner's due process claims that he was: 1) denied discovery, and 2) that the Specification of Charges failed to put him on notice as to which of his actions corresponded to

violations of which rule. (*In the Matter of Stein,* ¶56). The Court pointed out that it had previously (in the opinion) rejected Petitioner's challenges to the adequacy of the Specification of Charges, holding that Petitioner had been provided the general nature of the allegations and an opportunity to present facts in response. The Court also concluded that the Specification of Charges were adequate because "no facts were found or conclusions drawn that were not alleged in the Specification of Charges." (*In the Matter of Stein,* ¶56). As to the inadequate discovery claims, the Court held it had previously rejected those claims when "we denied Respondent's Petition for Extraordinary Writ and Emergency Request for Stay." The New Mexico Supreme Court concluded: "[W]hile Respondent may have been in denial about the gravity of his actions, we have no doubt that Respondent was not surprised by evidence submitted in the hearings below, and that he was in no way prejudiced by any purported lack of discovery." (*In the Matter of Stein,* ¶59).

The decision also addressed the use of Petitioner's website as evidence *only* of his failure to understand and accept responsibility for his conduct as matters in mitigation and aggravation. The New Mexico Supreme Court found no fault in such use for such purpose. (*In the Matter of Stein,* ¶71).

Petitioner does not contend herein that any decision of the Hearing Committee, the Disciplinary Panel, or the Supreme Court in 1) denying any discovery request, 2) admitting or refusing to admit the

introduction of any evidence, or 3) quashing of any Subpoena, was improper. Similarly, Petitioner does not contend that he was surprised by any evidence or prejudiced by any failure to grant a discovery request. Instead, Petitioner seems to contend that because he received no discovery, even though it was a result of his own failure to specifically request relevant and "needed" discovery, he was denied due process.

Although Petitioner raises arguments about the use of his website, Petitioner did not object to its introduction at the evidentiary hearing and raised no objection relating to it in the New Mexico Supreme Court. The website referred to is Petitioner's self-created, self-sponsored internet site, wherein he discusses his extensive litigation experience among other things. Disciplinary Counsel used Petitioner's words in his website as evidence of Petitioner's unwillingness to acknowledge and accept responsibility for his conduct. Petitioner made similar denials of wrongdoing before the Hearing Committee, the Review Panel, and the New Mexico Supreme Court.

Petitioner did not raise before the Hearing Committee, Review Panel, or the New Mexico Supreme Court, any argument that an improper standard of proof was applied to the proceedings.

REASONS TO DENY WRIT

This Court should not sit in judgment of the New Mexico Supreme Court's disbarment of a New Mexico

attorney where there has been no arbitrary and capricious decision and Petitioner was provided adequate notice of the charges against him and an opportunity to address those charges. *Theard v. United States,* 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957). The states' judiciaries have autonomous control over the conduct of their officers, including their lawyers. *Theard, supra.* The Court's control over its lawyers derives from their responsibilities to the Court. *Theard, supra.* A State Court's control through discipline is necessary for the protection of the public. *Theard, supra. See also* Preface N.M. Rules of Discipline attached as Appendix X. Nor does the use of Petitioner's website provide a justifiable basis for review, as Petitioner's website was only used as evidence that Petitioner did not acknowledge that his conduct was wrongful and thus to assess whether he might engage in the conduct again. The power of disbarment is necessary "for the protection of the public in order to strip a man of the implied representation by Court's that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do." *Theard*, 354 U.S. 278, 281.

I. NO DUE PROCESS RIGHT HAS BEEN INFRINGED WHERE PETITIONER WAS PROVIDED NOTICE OF THE CHARGES AGAINST HIM AND AN ADEQUATE OPPORTUNITY TO RESPOND

There is no Due Process violation where an attorney is disciplined in accordance with a State

disciplinary system when he or she is provided: 1) adequate notice of the charges against him, 2) a meaningful opportunity to respond, and 3) by the attorney's own admission, there was no surprise or prejudice to that attorney relating to the charges and evidence presented against him or her. The New Mexico system of discipline as established by the Rules of Discipline and as applied to Petitioner provided him with a fair hearing.

An attorney in a disciplinary proceeding, like an employee in a discharge proceeding, is entitled to "notice and an opportunity to be heard." *In re Fletcher*, 424 F.2d 783, 792 (8th Cir. 2005); *see also O'Neill v. Baker*, 210 F.3d 41, 48-49 (1st Cir. 2000) (an employee discharge proceeding). As such, the attorney has no constitutional right to engage in pretrial discovery. *Beef Nebraska Inc. v. United States*, 807 F.2d 712, 719 (8th Cir. 1986); *Alexander v. Pathfinder Inc., et al.*, 189 F.3d 735, 741 (8th Cir. 1999); and *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). Instead, the refusal to grant discovery must so prejudice the party as to amount to a denial of due process. *Chimielinski v. Commonwealth of Massachusetts Office of the Commissioner of Probation*, 513 F.3d 309, 317 (1st Cir. 2008). The New Mexico Rules Governing Discipline provided Petitioner with all necessary safeguards to assure that he was not prejudiced. The Rules permitted Petitioner to make a showing of need for any discovery he believed was important to his case.

None of Petitioner's claimed due process violations are factually or legally supported.

A. The Admission Of Petitioner's Website Pages Without Objection Is Not A Due Process Violation.

Petitioner's reliance on *New York Times v. Sullivan,* 376 U.S. 967, 84 S. Ct. 1130, 12 L. Ed. 2d 83 (1964) and *Garrison v. Louisiana,* 379 U.S. 64; 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) to establish a due process violation is misplaced. Neither case suggests that the Due Process clause is breached when a lawyer's own words are used to prove that he or she does not understand or will not honor his or her obligations and responsibilities as a member of a State Bar in an attorney disciplinary proceeding. To the contrary, this Court held in *Koenigsburg v. State Bar,* 366 U.S. 36 (1961) that protected speech is narrower than an unlimited license to talk, and that inquiry into a bar applicant's communist party membership was a legitimate inquiry into applicant's credibility and character.

There is simply no reason to apply as a prerequisite to the admission of speech, as evidence, a requirement that the speech be found to meet the "actual malice" standard as is required in a defamation case involving a public official. Unlike the defamation case, the use of Petitioner's own words as evidence that he does not acknowledge his own wrongdoing does not have a chilling effect on First Amendment rights.

Furthermore, Petitioner knows that his website was used only as evidence of whether he understood and accepted responsibility for his conduct. Petitioner made no claim before the New Mexico Supreme Court that the use somehow violated any of his rights. The fact that Disciplinary Counsel used Petitioner's words in his website to prove that Petitioner continued to refuse to acknowledge or accept responsibility for his conduct and refused to understand that he had done anything wrong is not significant, since there are a number of other sources of that information in the record. The transcript of the Hearing Committee contains an identical admission by Petitioner:

> "But as far as mitigating is concerned I did nothing wrong. I know you found differently."

(*See* TR 33 April 2, 2007 attached as Appendix U). Similarly, before the Disciplinary Board Hearing Review Panel, Petitioner again indicated:

> "But here I didn't do anything wrong."

(*See* TR 105 July 30, 2007 attached as Appendix V). Finally, in front of the New Mexico Supreme Court, Petitioner was asked, "Are you saying that there was no conflict of interest, or that they just didn't sufficiently allege conflict of interest?" Petitioner responded: "Well, if we look at the record, they didn't prove it. If we, if you're asking me, Justice Daniels, was there a conflict of interest, the answer is no." (*See* TR 10-11 December 19, 2007 attached as Appendix W). There was therefore ample evidence even without the use of the unobjected-to website that Petitioner

refused to acknowledge that his conduct was a violation of his professional responsibility, and a corresponding concern that he might engage in such conduct again without even understanding that his conduct was wrongful.

The use of Petitioner's website was not for the purpose of creating a separate offense, but instead was evidence to be considered, among other evidence, in determining the proper sanction. Therefore, no due process right was implicated. *See In re Kramer,* 282 F.3d 721, 726 (9th Cir. 2002).

B. Petitioner Was Made Fully Aware Of The Charges Against Him And Which He Was Found To Have Violated.

Petitioner was on notice that his failure to comply with the court's Order by continuing to represent a client, after the court had found a conflict, was a violation of the Order disqualifying him from representing that client. Petitioner's argument to the contrary is factually incorrect, logically flawed, and legally incorrect.

It is factually incorrect for two reasons. First, contrary to Petitioner's contention, the Specification of Charges does indicate: 1) the existence of the Orders of Court he was alleged to have violated, and 2) that Petitioner continued to represent a client in violation of one of those Orders. (*See* Specification of

Charges ¶¶39 and 46 attached as Appendix E). Second, Petitioner was put on notice of the Rules of Professional Conduct that are implicated when an attorney violates a court Order. (*See* Specification of Charges ¶48 d. attached as Appendix E). Petitioner's argument is logically flawed since there was no finding or conclusion of violation of a court's Order that was a basis of Petitioner's discipline.

Petitioner did not and does not claim that the facts as charged and found did not occur. Instead, he argued that the Order was wrong because there was no conflict of interest and that the Order, which he clearly knew about, only pertained to the one case, and not to his conduct with regard to the client he was disqualified from representing. The Hearing Committee Review Panel and New Mexico Supreme Court disagreed.

Petitioner's argument is legally incorrect because where, as here, he was provided notice of the Orders and the Rules he was alleged to have violated, he was provided all of the notice necessary to fulfill Constitutional requirements.

C. The Specification Of Charges Set Forth The Allegations Of Petitioner's Misrepresentations, Finding Of Misrepresentation And Fraud Such That Petitioner Did Not Require Further Notice Or Discovery.

The fact that the Supreme Court of New Mexico found that the Specification of Charges met the pleading requirements of fraud and misrepresentation, and further found that there was no evidence of which Petitioner was unaware that was used by Disciplinary Counsel in the proceedings, refutes Petitioner's claims that the Due Process Clause was violated preventing him from obtaining a fair proceeding. Petitioner, in this section, asks this Court to review and overrule the New Mexico Supreme Court in its application of its rules to the Specification of Charges. There is no need for this Court to do so, since there is ample evidence to support the conclusion that Petitioner was aware of the misrepresentation and fraud charges and not unfairly prejudiced by the evidence that was introduced to support those charges.

The Specification of Charges specified the alleged misrepresentations by Petitioner relating to the two Federal Court lawsuits. In Specification of Charges paragraphs 34-36, Petitioner was put on notice that the allegations against him included his negotiating a settlement of the Citigroup lawsuit without advising

Citigroup of the Petition for Appointment of a Guardian and Conservator, the Motion to disqualify him as counsel, that the Court granted the Motion to disqualify him, or of the appointment of a temporary guardian and conservator for the (former) client he was still purporting to represent. Further, paragraphs 44 and 45 of the Specification of Charges put Petitioner on notice of the alleged misrepresentations to the Federal Court. (*See* Appendix E).

Based upon those paragraphs, and noting that the rule was to put the person on notice of the claim and did not need to provide the evidentiary details of the claim, the New Mexico Supreme Court found in its opinion that Rule 1-009(B) was complied with:

> "In conclusion, the Specification of Charges filed by deputy disciplinary counsel met the pleading requirements of Rule 1-009(B), because the particular factual allegations were alleged in detail and the rules were stated with specificity so as to leave no doubt as to the charges against Respondent."

In the Matter of Stein, ¶46.

As discussed more fully below, the New Mexico Supreme Court also concluded that Petitioner was not surprised or prejudiced by any evidence used by Disciplinary Counsel.

Petitioner was, therefore, provided notice and an opportunity to be heard on the claims of misrepresentation and fraud as the Constitution requires. Furthermore, Petitioner's lack of surprise and/or

prejudice relating to the introduction of any evidence indicates Petitioner was on notice of the charges and evidence against him.

D. Petitioner Had Available To Him The Discovery Tools Necessary To Afford Him Due Process.

The New Mexico Disciplinary Rules provide equal access to discovery to an attorney charged with a disciplinary violation as it does to Disciplinary Counsel. Either can obtain discovery upon a showing of need. (*See* 17-311 Rules Governing Discipline attached as Appendix J). Further, either can request the issuance of subpoenas. (*See* Rule 17-306(B) Attached as Appendix Y). Disciplinary Counsel requested no formal discovery. Petitioner in this case made no showing of need and therefore also engaged in no formal discovery. Further, although Petitioner engaged in no discovery, by his own admission, there was no evidence introduced by Disciplinary Counsel that Petitioner was surprised by or which prejudiced him. Petitioner was *not* therefore denied any Due Process, since Due Process merely ensures that a party receive notice of the charges against him and a meaningful opportunity to respond.

Petitioner in this case failed to meet the required showing, "need," for any of the discovery he requested in only general terms. Furthermore, as borne out in retrospect in this case, Petitioner needed no formal

discovery. At each review stage of the proceedings below, Petitioner was given the opportunity to identify any evidence that he was surprised by or which caused him prejudice. (*See* Statement of the Case). Petitioner could identify none, even at the Supreme Court of New Mexico. No due process violation has occurred.

E. The Standard Of Proof In New Mexico Disciplinary Proceedings Is A Preponderance Of The Evidence.

Petitioner attempts to grab the attention of this Court by claiming that he was afforded an unequal ability to engage in discovery and that the charges against him were changed after or during the hearing. Both claims are inaccurate. Petitioner was provided equal access to discovery. (*See* Section I D *supra*). Furthermore, there is no finding by the Hearing Committee that is not in the Specification of Charges nor, does Petitioner claim that there was any change to the charges. Petitioner's argument then, in this section, is whether an attorney who is provided notice of the charges against him and an opportunity to meet and refute the evidence introduced is nevertheless entitled to the benefit of a higher burden of proof before being disciplined. Petitioner cites *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) for this proposition. *In re Ruffalo,* however, does not go this far, and New Mexico law is clear that the standard of proof is the preponderance of evidence

standard. *In re D'Angelo,* 105 N.M. 391, 733 P.2d 360 (1986), cert. denied, 479 U.S. 1065 (1987).

In Re Ruffalo required that notice of the charges against a lawyer had to be provided to the lawyer prior to the hearing, and new charges could not be added at or after the hearing or as a result of the evidence adduced at the hearing. Such notice was provided to Petitioner and no new charges were added. Petitioner argues that because *In re Ruffalo* indicated that disciplinary proceedings are quasi-criminal in nature, the same protections provided to a citizen whose liberty rights are being affected should apply to him. Petitioner has not cited a single case holding that due process requires this higher standard in an attorney disciplinary proceeding. *In re Ruffalo* did not so hold.

Both cases cited by Petitioner indicating application of a higher burden of proof involved liberty interests. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) involved the indefinite commitment of allegedly mentally ill patients in need of hospitalization for the protection of themselves or others. *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 323 (1970) involved the prosecution of a juvenile charged with stealing which rendered him liable to confinement for as long as six (6) years. Petitioner makes no claim that the interest at issue he is attempting to protect rises to the level of the liberty interest at issue in either *Addington, supra,* or *Winship, supra*. Instead, Petitioner's interest is merely in continuing to be able to exercise the privilege of

practicing law in the courts of New Mexico. Unlike those in jeopardy of being confined who should not bear the risk of an erroneous confinement equally with society (*Addington,* 441 U.S. at 427), a lawyer can and should be asked to share equally with society the risk of error that might occur in a proceeding to discipline the attorney for his or her failure to abide by his or her professional responsibilities. Petitioner's interest is akin to an employment claim which traditionally utilizes the preponderance of the evidence standard. The preponderance of the evidence standard is fully consistent with due process in attorney discipline proceedings.

In any event, Petitioner has failed to preserve this issue by failing to alert the Hearing Committee, the Review Panel, or the New Mexico Supreme Court to this argument.

II. FIRST AMENDMENT RIGHTS WERE NOT IMPLICATED BECAUSE PETITIONER WAS NOT DISCIPLINED FOR HIS STATEMENTS.

The First Amendment does not protect against the use of all speech. Speech can, for example, be used to establish the elements of a crime or to prove motive or intent. *Wisconsin v. Mitchell,* 508 U.S. 476, 489, 113 S. Ct. 2194, 2201, 124 L. Ed. 2d 436, 447 (1993). In this case, Petitioner was not disbarred for making his statements; rather, the statement on his website together with his prior disciplinary history

was relevant to the determination of the appropriate sanction to be imposed. *See In re Kramer,* 282 F.3d 721, 726 (9th Cir. 2002).

In his Petition, Petitioner does not set forth the specific speech, nor does he indicate how the speech was used. However, even a cursory review of the New Mexico Supreme Court opinion indicates that the speech was used as evidence only in the degree of discipline stage, and the speech used was not that which was critical of public officials, but only those parts of the speech which indicated that Petitioner did not understand what his professional responsibilities were or how he had violated them. The speech was used to determine what degree of discipline was necessary to protect the public and to deter future ethical violations. As such, the use of the speech was not protected by the First Amendment. *Id.*

The speech was introduced as evidence in the separate hearing devoted to aggravation and mitigation and to assess the degree of discipline on April 2, 2007 after Petitioner's liability for the ethical infractions was already established. Petitioner did not object to the introduction of the evidence. Under New Mexico law, the failure to raise an objection to the evidence at the time of hearing is a waiver of that issue and it cannot thereafter be raised on appeal. *Wolfley v. Real Estate Commissioners*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983); *Barnett v. Cal M, Inc.*, 79 N.M. 553, 556, 445 P.2d 974 (1968). The requirement of preservation of error serves the purpose of allowing the opponent of an objection to meet the

objection with either evidence or argument. *Lopez v. Las Cruces Police Department,* 2006-NMCA-074 ¶6, 139 N.M. 730, 734, 137 P.3d 670, 674.

Further, there were numerous other indications, in addition to the website, to support the conclusion that Petitioner did not understand his responsibilities or his violations of those responsibilities. Such other indications culminated in Petitioner's comment to the Supreme Court when asked whether he had a conflict of interest:

> " . . . if you are asking me, Justice Daniels, was there a conflict of interest, the answer is no."

The use of Petitioner's website statements as evidence of his unwillingness to acknowledge his responsibilities as a lawyer and to assess the likelihood he would engage in violations of the rules in the future does not infringe on his First Amendment rights because he was not disciplined or disbarred for any comments he made about the trial court complaining Judge, Disciplinary Counsel, or the Supreme Court of New Mexico.

CONCLUSION

For all of the foregoing reasons, Respondent requests that the Supreme Court deny review of this matter.

Respectfully submitted,

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EXHIBIT A

[SEAL]

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

LINDA M. VANZI
DISTRICT JUDGE

[Address Omitted In Printing]

September 21, 2005

Disciplinary Board
P.O. Box 1809
Albuquerque, NM 87103-1809

Re: Stuart L. Stein, Esq.

Dear Sir or Madam:

Pursuant to Rule 16-803A, I am notifying you of what I believe to be violations of the rules of professional conduct by Mr. Stuart L. Stein, Esq. Specifically, the violations fall under Rules 16-107, 16-108, 16-109, 16-114, 16-401 and 16-402.

I BACKGROUND

On March 4, 2005, a petition was filed in this Court seeking appointment of a guardian and conservator for Bruce C. Clinesmith. *See In the Matter of Bruce C. Clinesmith, An Adult Incapacitated Person,* No. PQ-2005-00063. The petition was filed by Mr. Clinesmith's daughter who seeks the appointment of a neutral guardian and conservator for her father because of concerns about Mr. Clinesmith's emotional

and financial well-being. Mr. Clinesmith is suffering from rapidly progressing dementia and is currently living at The Woodmark, a residential facility in Albuquerque. At the time of the filing of the petition, Stuart Stein represented both Mr. and Mrs. Clinesmith. He sought the appointment of Mrs. Clinesmith as both her husband's guardian and conservator. There is no doubt that Mrs. Clinesmith is Mr. Stein's "real" client in this and two other lawsuits discussed below because, to date, he has only represented her financial interests in each of the matters.

It is important to note that there is a significant amount of money at the heart of these various lawsuits. Between 1997 and 1999, Mr. Clinesmith set up three trusts valued at approximately $13 million. The money was to go – almost in its entirety – to the Moody Bible Institute upon Mr. Clinesmith's death. There was no question among the members of Mr. Clinesmith's immediate family that what he wanted to do with his money when he died was to give it to a church. And, until Mr. Stein entered his appearance as Mrs. Clinesmith's attorney, there was never a challenge to his wishes.

Prior to the filing of the guardianship/conservatorship petition, Mr. Stein had sent a letter dated March 28, 2005 to the Moody Bible Institute requesting that Mr. Clinesmith's trust be emptied and that the money be given to Ruth Clinesmith. When the trustee refused the request, Mr. Stein filed two lawsuits in federal court. One of the lawsuits, currently pending before Judge James Parker, asserts

two counts to revoke the trusts and to put control of the money in Ruth Clinesmith's hands and also seeks a determination that the assets in those trusts are community property. *Ruth M. Clinesmith, individually, and Bruce C. Clinesmith, by Ruth M. Clinesmith, his attorney-in-fact v. Moody Bible Institute of Chicago, D.L. Moody Trust Company, and Marvin E. Beckman,* No. CIV 05-664 JP/DJS, filed June 22, 2005, attached as Exhibit "A" (Complaint I).

The other lawsuit, before Judge Leslie Smith, is a complaint for damages and access to a joint account by Ruth M. Clinesmith. *Ruth M Clinesmith v. Citigroup Global Markets, Inc, d/b/a Smith Barney Citigroup, John or Jane Doe and ABC Entity,* No. CIV 05-696 LAM/LCS, filed June 15, 2005, attached as Exhibit "B" (Complaint II).

It is significant that neither lawsuit names Mr. Clinesmith as a plaintiff individually. In Complaint I, the suit seeking to invalidate the trusts is brought on behalf of Bruce C. Clinesmith by his wife as his attorney-in-fact. In paragraph 17 of the Complaint, Mr. Stein acknowledges that Mr. Clinesmith "was suffering from early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis." In Complaint II, although Mr. Clinesmith is not named in the caption, paragraph 8 states "[t]hat there is a current question about the competence of Bruce C. Clinesmith."

II IN THE MATTER OF BRUCE C. CLINESMITH, PQ 2005-00063

Several hearings have taken place, and countless motions have been filed since the inception of this case. Among the motions on which the Court has ruled, several concern Mr. Stein's representation of Mr. Clinesmith. As further set forth below, Mr. Stein has been disqualified from representing Mr. Clinesmith, and subsequently was disqualified from representing Mrs. Clinesmith. In addition, a full temporary guardian and conservator was appointed for Mr. Clinesmith. Despite several admonitions by the Court, the orders of disqualification, and the appointment of a temporary guardian and conservator, Mr. Stein has repeatedly violated the Court's Orders and continues to put Mr. Clinesmith at emotional and financial risk.

A. Hearing of July 18, 2005

Shortly after the filing of the petition in this case, on July 18, 2005, the Court held its first hearing to address several pending motions. Present were (among others) the Court-appointed Guardian Ad Litem, Richard Reidy. Gregory MacKenzie and Thomas Popejoy appeared on behalf of the petitioner, Cathe Temmerman. Mr. Stein appeared on behalf of Mr. and Mrs. Clinesmith. All parties had agreed that it was not in Mr. Clinesmith's best interest to be present.

Among the motions to be heard on July 18th were two that are relevant to this letter. The first concerned Mr. Stein's request that the hearing be opened to the public. The second concerned a motion to disqualify Mr. Stein from representing Bruce Clinesmith.

(i) Mr. Stein's Motion for Open Hearing

The Probate Code provides that whether a guardian shall be appointed for an alleged incapacitated person shall be determined at a *closed* hearing unless the alleged incapacitated person requests otherwise. NMSA § 45-5-303(J). The same is true for conservatorship proceedings. *See* NMSA § 45-5-417(0). Mr. Stein's motion, however, was brought by Mrs. Clinesmith on her own behalf and on behalf of her husband. Mrs. Clinesmith was not Mr. Clinesmith's guardian, In other words, Mr. Clinesmith himself did not and could not make the request.

What is most troubling about Mr. Stein's motion for an open hearing was his complete lack of concern regarding the sensitive nature of guardianship/ conservatorship proceedings coupled with his utter disregard for his client's right to privacy. In fact, Mr. Stein's purported reason for the request was "to open this up for the public to let the family come in and anyone else who would want to see how the system

works."[1] Transcript of Proceedings on July 18, 2005, attached as Exhibit "C" (Transcript I) at p. 5, lines 16-19. The "family" referred to by Mr. Stein are Mrs. Clinesmith's family whose interests have been shown to be clearly adverse to Mr. Clinesmith.

(ii) Motion to Disqualify Stuart Stein from Representing Bruce C. Clinesmith

The Court also heard argument on the Petitioner's motion to disqualify Mr. Stein from representing Mr. Clinesmith. Specifically, the Petitioner argued, and the Court agreed, that the interests of Mrs. Clinesmith are adverse to Bruce Clinesmith

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[1] Mr. Stein went on to say: "The Court does know and I think we all can take notice of the fact that many people are very much concerned about how the guardianship and conservatorship system works with the courts. Every once in a while I'll see the people downstairs with the signs picketing about how they feel it was unfair. And I think part of the unfairness is the feeling that people weren't allowed into the courtroom to hear what is going on." Transcript I at p. 8, lines 12-20.

Then, "[v]ery often interested parties come in for the purposes of excusing a judge, which may have happened in this case, I don't know." *Id.* at p. 9, lines 3-5. "And I know the Court is going to give both sides full and liberal ability to present their case. And I want everybody to know that that has been done and that it should not be attacked because somebody thought that maybe the Court was giving this short shift or the lawyers weren't fully prepared and didn't present what they should have presented. *Id.* at lines 12-17.

which would give rise to a conflict of interest. Court's Order dated August 5, 2005, attached as Exhibit "D".

Mr. Stein filed two lawsuits in federal court on behalf of the Clinesmiths, one of which – Complaint I – seeks relief in the form of a preliminary injunction to obtain control over half of the assets of the Clinesmith trust. Mr. Clinesmith was clearly the grantor and income beneficiary of those trusts yet Mr. Stein seeks to invalidate the very trust that Mr. Clinesmith created many years ago. Moreover, Complaint I seeks to void the trusts and to obtain a ruling that the trust proceeds are, in fact, community property and that Mrs. Clinesmith is entitled to half of the proceeds. Thus, Mrs. Clinesmith has an interest in the outcome of both the guardianship/conservatorship proceedings and the federal court matter as it will affect her ability to control Mr. Clinesmith's finances.

Remarkably, Mr. Stein argued to the Court that there was no problem representing both Mr. and Mrs. Clinesmith because Mr. Clinesmith had recently been in his office "and he was able to articulate that he did, in fact, want [Mr. Stein] to represent him. . . ." Transcript I at p. 30, lines 1-2. This was in direct contrast to Mr. Stein's previous assertions both in his pleadings and earlier in Court. For example, in both federal court lawsuits, Mr. Stein noted that Mr. Clinesmith was suffering from signs of dementia. Complaint I at par 17; Complaint II at par 8. In fact, Complaint I is brought on behalf of Bruce C. Clinesmith by his wife as his attorney-in-fact. In addition, under further questioning by the Court, Mr. Stein

agreed "that [Mr. Clinesmith] is incapacitated to the extent that he many need a guardian or conservator." Transcript I at p. 30, lines 19-20. He even went on later to say "I want to make very clear that if Dr. Summers was called to the stand, what he would say is when he went to see Bruce Clinesmith after the daughter and the visitor were there and asked him what happened this day, what do you remember, he would tell you and his notes would reflect that he could not remember that his daughter visited with him, he could not remember that the visitor came with the daughter. . . ." *Id.* at p. 85, lines 12-18.

Mr. Stein's representation of both Mr. and Mrs. Clinesmith was a clear conflict of interest as set forth in Rule 16-107. It is seriously questionable that Mr. Clinesmith agreed to the dual representation or that he was competent to make that decision. There was certainly no evidence that Mr. Stein consulted with each of his clients and explained the implications of the common representation as required by the Rule.

It is important to note that after hearing and the Court's oral ruling on the disqualification motion, the Court appointed Decades LLC as the temporary guardian and conservator for Mr. Clinesmith until such time that the trial on the merits could be held. *See Id. at* p. 98, lines 14-16. The Court further required Decades to consult with the Guardian Ad Litem and to hire an attorney to represent Mr. Clinesmith's interests in the federal court proceedings. *Id.* at lines 18-21. Finally, the Court orally ruled that Mrs. Clinesmith's power-of-attorney would no longer

be in effect as Mr. Clinesmith would be represented. *Id.* at p. 100, lines 21-25. A written Order reflecting the Court's ruling was filed on August 5, 2005.

Subsequent to the Order, on August 11, 2005, Ruth Pregenzer, Robin Goble, and Nell Graham Sell of the law firm of Miller Stratvert PA. entered their appearance on behalf of Decades in both the state court and federal court matters. Additionally, in their capacity as the attorneys for the Court-appointed guardian and conservator, the Miller firm sent a letter to Mr. Stein on August 11, 2005 formally terminating him from representing Mr. Clinesmith in any proceedings effective July 18, 2005. Letter dated August 11, 2005 from Nell Graham Sale to Stuart L. Stein, attached as Exhibit "E".

B. Hearing of August 22, 2005

On August 22, 2005, the Court held an emergency expedited hearing on Decades' Motion to Prohibit Interference with Temporary Guardian and Conservator, Performance of Duty, Exercise of Power. In an egregious showing of indifference to the Order of the Court, as well as to the Rules of Professional Conduct, on August 18, 2005, Mr. Stein went to The Woodmark and had Mr. Clinesmith removed from the locked dementia unit[2] and taken to a private room.

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[2] Dr. Summers, a friend of Mr. Steins and who appears on Mr. Stein's radio show, had access to the locked dementia unit and went and got Mr. Clinesmith from his room. Dr. Summers,

(Continued on following page)

When one of Decades' staff members arrived at the Woodmark, she went into the room and advised Mr. Stein that he did not have the legal capacity to represent Mr. Clinesmith. Despite repeated requests to discontinue the meeting and to leave, Mr. Stein refused and said that he was going to ask Mr. Clinesmith to execute documents he had brought with him. Affidavit of Catherine S. Combs, attached as Exhibit "F"; Affidavit of Barbara J. Singer, attached as Exhibit "G". *See also Letter* dated August 17, 2005 from Nell Graham Sale to Stuart Stein, attached as Exhibit "H".

Mr. Stein had with him a new Will and an Amended and Restated Trust both of which materially would alter Mr. Clinesmith's current revokable living trust and estate plan. Will, attached as Exhibit "I", Amended and Restated Trust, attached as Exhibit "J". The new revokable living trust not only gave Mrs. Clinesmith a community property interest in the 1997 and 1999 trust (worth about $10 million), but also named her as trustee. Moreover, it allowed her to add a trustee at any time, to amend or revoke the trust, and gave her the power of appointment. Under Mr. Stein's guidance, Mr. Clinesmith signed both documents. Mr. Stein refused to permit Decades any opportunity to review the documents in advance of them being presented to Mr. Clinesmith and then

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along with two members of Mr. Stein's office staff and Mrs. Clinesmith were also present in the room.

refused to give Decades or their attorneys a copy of the stack of "supporting" documents he had brought with him that day. Transcript of August 22, 2005 Hearing at p. 43, lines 14-22, attached as Exhibit "K" (Transcript II).

Mr. Stein does not dispute that when he went to the Woodmark he did not notify Decades. *Id.* at p. 20, lines 3-6. Remarkably, he told the Court that he "didn't have to": because it was not explicitly stated in the Order. *Id.* at lines 7-17. Mr. Stein also admitted that he did not contact Mr. Reidy, the Guardian Ad Litem, or Ms. Pregenzer before seeing Mr. Clinesmith. *Id.* at lines 6-19. In fact, Mr. Stein had been to the Woodmark to see Mr. Stein twice without notifying any the above. *Id.* at p. 31, lines 12-21. When asked if it was his practice to approach incapacitated persons without notifying the Court-appointed guardian/conservator or any other person caring for the individual, Mr. Stein responded, "[in] this case this is what I did and I feel that it is fine. It is ethical, and not in contravention of your order. . . ." *Id.* at p. 23, lines 8-13.

Mr. Stein knew that pursuant to Court order he was disqualified from representing Mr. Clinesmith. In fact, Mr. Stein knew that Mr. Clinesmith was represented by counsel. Further, Mr. Stein knew that Mr. Clinesmith was in a locked dementia unit. *Id.* at p. 24, lines 2-4. Finally, Mr. Stein had written and argued several times that Mr. Clinesmith may be suffering from some form of Alzheimers. Nevertheless, Mr. Stein believed that it was ethical to remove

Mr. Clinesmith and have him sign a new will and trust because "there was no order of this Court prohibiting [him] to do so . . . " *Id.* at page 25, lines 6-12.

When asked whether he thought "that the fact that the Court disqualified [him] from representing Mr. Clinesmith at the last hearing might pose a problem if [he] went to see him," Mr. Stein responded, "No, because – candidly, no, because I represent *Mrs. Clinesmith. It is her husband that is a ward in this case, and as her lawyer, I want to be able to speak to him. . . .*" *Id.* at p. 29, lines 14-21 [emphasis added]. Thus, notwithstanding that this Court already found an impermissible conflict of interest between Mr. and Mrs. Clinesmith, that an Order was entered disqualifying Mr. Stein from representing Mr. Clinesmith, that a full temporary Guardian and Conservator had been appointed for Mr. Clinesmith, and that Mr. Clinesmith was represented by counsel, Mr. Stein removed Mr. Clinesmith from a locked dementia unit and had him sign a new will and trust[3] giving Mrs. Clinesmith an interest in his money.

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[3] Mr. Stein claims he spent an hour at the Woodmark with Mr. Clinesmith and that Mr. Clinesmith did not read the half inch thick documents presented to him either at that time or prior to Mr. Stein's arrival. Transcript II at p. 44, lines 19-25 – p. 45, line 1. Instead, Mr. Stein and Mr. Clinesmith "went through it together, through the important parts." *Id.* at lines 1-2. It is curious that Mr. Stein now contends that Mr. Clinesmith was concerned about increasing the gifts to his daughter, *id.* at lines 2-3, when just five months earlier, Mr. Clinesmith purportedly signed a document stating that no money from his

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Mr. Stein's conduct in contacting Mr. Clinesmith not just once, but twice, was completely inappropriate and egregious. At this hearing on August 22, 2005, Mr. Stein was enjoined from having any contact with Mr. Clinesmith. In addition, Mr. Stein was ordered to produce *all* documents concerning Mr. Clinesmith to Ms. Pregenzer by the 5:00 p.m. on Wednesday, August 24, 2005, *Id.* at p. 48, lines 18-20. A subsequent written Order was filed on August 29, 2005. Order, attached as Exhibit "M".

C. Hearing of September 1, 2005

On September 1, 2005, the Court held a hearing on petitioner's Motion to Disqualify Stuart L. Stein, Esq. from Representing Ruth Clinesmith and Elizabeth Brown and All Other Persons with Interests Adverse to Bruce C. Clinesmith. A Memorandum Order granting the motion was filed on the same date.[4] *See* Memorandum Order, attached as Exhibit "O".

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estate was to be paid to his daughter. *See* Note signed by Mr. Clinesmith dated March 14, 2005 (submitted to the Court for an *in camera* inspection because Mr. Stein believes it to be protected by the attorney-client privilege), attached as Exhibit "L".

[4] At that hearing, the Guardian Ad Litem testified that he had met with Mr. Clinesmith and that Mr. Clinesmith was "unable to express to [him] even an understanding or position as to whether there would be a conflict or he would wish that there be a disqualification." Transcript of September 9, 2004 Hearing, p. 20, lines 18-23, (Transcript III), attached as Exhibit "N". Moreover, the Guardian Ad Litem did not think that Mr.

(Continued on following page)

Among the issues raised at the September 1, 2005 hearing was Decades' Motion Directing Wachovia Securities to Provide Information Regarding Funds Transferred from Joint Account of Bruce C. Clinesmith and Ruth M. Clinesmith. While some of the issues surrounding the Wachovia Securities account are incorporated into Memorandum Order, a full discussion can be found in Section III, *infra.*

There is no doubt that Mr. Stein's primary concern is money – money for Mrs. Clinesmith and for himself. Indeed, he has argued that Moody Bible "promised to pay my legal fees up until July 18. . . . I gave them a bill for that. I've never gotten paid." Transcript III, p. 29 at lines 5-7, Indeed, Moody Bible had already paid Mr. Stein $25,000 to represent the Clinesmiths. Mr. Stein goes on to complain that this is about "economic strangulation" of Mrs. Clinesmith and that his access to the Smith Barney account has been denied. *Id.* at lines 8-11.

Instead of addressing the needs of Mr. Clinesmith, the Court has been consumed with addressing Mr. Stein's questionable actions. His behavior has compromised the integrity of these proceedings and has left Mr. Clinesmith without the immediate care and attention he needs.

Clinesmith would be capable of knowingly agreeing to waive the conflict and consenting to the representation of Ruth Clinesmith by Mr. Stein. *Id.* at p. 21, lines 1-3.

III RUTH M. CLINESMITH V. CITIGROUP GLOBAL MARKETS, INC. D/B/A/ SMITH BARNEY CITIGROUP, JOHN OR JANE DOE AND ABC ENTITY, NO. CIV 05-696 LAM/LCS

Although this is a federal court case, many of the issues overlap with the state court matter. Specifically, the Clinesmiths at one time had a joint account with Smith Barney Citigroup. Over the past several months, Mr. Stein has been involved in communications with Citigroup in an attempt to close the Clinesmith's account with Smith Barney and to transfer the funds to Wachovia Securities in Mrs. Clinesmith's name alone.

On July 13, 2005, five days before the hearing on the Motion for Appointment of Temporary Guardian and Conservator, and Motion to Disqualify Stuart Stein from representing Mr. Clinesmith in state district court, Mr. Stein faxed a letter to Jim Goddard at Citigroup Global Market confirming that the freeze on the Smith Barney account would be lifted[5] and stating that the case was effectively settled contingent upon the account being transferred and Mrs. Clinesmith signing the necessary papers. Letter dated July 13, 2005 from Stuart L. Stein to Jim Goddard, attached as Exhibit "P". Subsequently, on July 15, 2005, Mr. Stein informed Mr. Goddard that a

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[5] Apparently, Citigroup had a concern about Mr. Clinesmith's competence when he signed the Power of Attorney in 2004 and, as a result, had frozen the funds.

new account had been opened in Mrs. Clinesmith's name alone at Wachovia Securities. Mr. Stein noted that the advisor "told me that there could be a question raised – resulting in an unnecessary delay – because we're moving a joint account at Smith Barney to an account just in the name of one joint tenant at Wachovia." Letter dated July 15, 2005 from Stuart L. Stein to Jim Goddard, attached as Exhibit "Q". He never mentioned the upcoming hearing on petition for appointment of temporary guardian and conservator for Mr. Clinesmith.

On July 28, 2005, a full ten days after the Court's ruling appointing Decades a full temporary guardian and conservator, and after terminating Mrs. Clinesmith's power of attorney, Mr. Stein again wrote to Mr. Goddard about the transfer of the account. Letter dated July 28, 2005 from Stuart L. Stein to Jim Goddard, attached as Exhibit "R". Mr. Stein never advised Mr. Goddard that a temporary conservator had been appointed or that the power of attorney was no longer in effect. Letter dated August 29, 2005, from James Goddard to Nell Graham Sale, attached as Exhibit "S". On about July29, 2005, Smith Barney transferred approximately $279,764 to Mrs. Clinesmith's sole Wachovia account based on Mr. Stein's representations.[6] Although it is now frozen, the funds

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[6] It should be noted that a recently acquired document signed by Mr. and Mrs. Clinesmith and addressed to Mr. Stein requested that the funds from their joint account be transferred from Smith Barney Florida to the Smith Barney Albuquerque

(Continued on following page)

remain in an account solely in Mrs. Clinesmith's name.

IV RUTH M. CLINESMITH, INDIVIDUALLY, AND BRUCE C. CLINESMITH, BY RUTH M. CLINESMITH, HIS ATTORNEY-IN-FACT V. MOODY BIBLE INSTITUTE OF CHICAGO, D.L. MOODY TRUST COMPANY, AND MARVIN BECKMAN, NO. CIV 05-664 JP/DJS

Mr. Stein's flagrant disregard for the Rules of Professional Conduct and the Orders of the Court appear to have no end. Just last Friday, September 16, 2005, Mr. Stein filed a motion to vacate an initial scheduling order in the above-captioned federal court case. The opening paragraph states:

> COME NOW Plaintiff RUTH M. CLINESMITH, on her own behalf and on behalf of her husband BRUCE C. CLINESMITH *under her durable power of attorney attached as Exhibit A to the original Complaint* in this cause and. . . .

Motion to Vacate Initial Scheduling Order Hearing of October 13, 2004 [emphasis added], attached as Exhibit "U". Since July 18, 2005, the durable power of attorney has not been in effect yet Mr. Stein is *still*

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branch, *not* Wachovia Securities as ultimately happened. *See* Letter dated March 20, 2005 from Ruth and Bruce Clinesmith to Stuart Stein, attached as Exhibit "T".

bringing motions on behalf of Mr. Clinesmith under Mrs. Clinesmith's durable power of attorney. There can be no mistake that the error in Mr. Stein's pleading was intentional as he sought concurrence for the motion (as required by local federal rules) only from the Defendants and not from Mr. Clinesmith's attorneys at the Miller Stratvert firm.

I am very concerned about Mr. Stein's actions in the state district court case and in the two federal proceedings. Persons in need of guardians and conservators are some of the most vulnerable in our population. They are often the ones most in need of protection. I am also concerned about Mr. Stein's flagrant violations of the Rules of Professional Conduct. He shows an utter disrespect for the legal system, including the courts, other attorneys, and those members of the public seeking the court's assistance. Further, Mr. Stein's moral judgment and sense of ethics is questionable.

I appreciate your prompt attention to this matter. Please feel free to contact me if you have any questions or concerns. If the Board would like the names of the attorneys involved in these various proceedings or if it needs additional documentation, please let me know.

Sincerely,

/s/ Linda M. Vanzi
LINDA M. VANZI
District Court Judge

EXHIBIT B

[SEAL]

The Disciplinary Board
AN AGENCY OF THE SUPREME COURT OF THE
STATE OF NEW MEXICO

[Address and Phone Numbers Omitted In Printing]

CONFIDENTIAL

September 22, 2005

Stuart L. Stein, Esq.
2155 Louisiana N.E., Ste. 2200
Albuquerque, New Mexico 87110

Dear Mr. Stein:

The office of disciplinary counsel has received a complaint against you from The Honorable Linda M. Vanzi dated September 21, 2005 containing allegations of professional misconduct. A copy of the complaint is enclosed.

Before proceeding further, we would like to hear your side of this controversy. You are, therefore, requested to respond to the allegations in the complaint. Please respond to this office; the Board has asked that Board members not be contacted directly or by mail, as they may ultimately be called upon to determine the merits of a particular complaint if charges are filed. In order to expedite this matter, may we have your reply *by October 6, 2005.* Feel free to include any additional information you deem relevant. Please be assured that this request does not indicate a prejudgment of the complaint.

I also wish to inform you that the Preface of the Supreme Court Rules Governing Discipline obligates you as an attorney to give your unstinted cooperation and assistance to the Disciplinary Board. In addition, Disciplinary Rule 16-803(D) makes it a breach of the Rules of Professional Conduct for an attorney to fail to give his full cooperation and assistance to the Disciplinary Board and Disciplinary Counsel. The Board has instructed this office to institute formal charges against any attorney who fails to respond promptly to an inquiry of this type. I therefore request you to respond within the time set forth above. If you require more time, short extensions may be requested by calling Erlinda of this office.

In that complaints occasionally result in formal charges being filed against an attorney, it appears appropriate to advise you that if that were to occur in this case, your reply to this letter might be offered into evidence as a written statement by a party to a cause of action.

Thank you for your assistance and cooperation.

Very truly yours,

/s/ Virginia L. Ferrara
Virginia L. Ferrara
Chief Disciplinary Counsel

VLF/eda
Enclosure as noted.

EXHIBIT C

[LOGO]

THE STEIN LAW FIRM

[Address Omitted In Printing]

October 11, 2005

Joel L. Widman, Esq.
Deputy Disciplinary Counsel
Post Office Box 1809
Albuquerque, NM 87103-1809

Re: Complaint of Hon. Linda M. Vanzi
Your Letter of October 6, 2005

Dear Mr. Widman:

This writer would fully respond to the complaint letter of Judge Vanzi if your office will stipulate in a reply letter that should any formal charges be filed that we would stipulate before the Chair of any Hearing Committee that full discovery will be allowed including depositions of Judge Vanzi as the complainant and all other listed witnesses, as well as allow interrogatories, requests to produce and requests for admissions.

The letter stipulation from your office would also state that if the Hearing Chair would not allow this full discovery upon a formal, filed stipulation that your office would dismiss any filed Specification of Charges with prejudice.

Lastly, should your office agree to the basic due process discovery outlined above, this office will need more time to fully respond to Judge Vanzi's complaint

letter than the October 17, 2005 date mentioned in your letter of October 6, 2005 and received today after the long weekend. This is just one week. Judge Vanzi seemed to have taken three weeks to draft and send the complaint letter, figuring from the September 1, 2005 date when this writer was removed from the underlying case. This office should have no less time to work on a response.

Yours very truly,
THE STEIN LAW FIRM

by /s/ Stuart L. Stein
Stuart L. Stein

EXHIBIT D

N.M.R.A. 17-309 (2008) Formal charges; designation of hearing officer or committee

A. Institution of proceedings. Formal disciplinary proceedings shall be instituted by the filing of a specification of charges with the chair of the Disciplinary Board and the issuance by the chair of formal notice to the respondent-attorney. A copy of the notice, together with a copy of the specification of charges, shall be served upon the respondent-attorney.

B. Contents of specification of charges. The specification of charges shall contain:

(1) a brief and plain statement of the charge, or if more than one, each of the separate charges of professional misconduct asserted against the respondent-attorney;

(2) the provisions of the Rules of Professional Conduct, court rule, statute or other law claimed to have been violated;

(3) the names and addresses of all known witnesses against the respondent-attorney;

(4) all known factors in aggravation; and

(5) the name and address of the particular disciplinary counsel who is expected to prosecute the matter.

Specification of charges shall be signed by chief disciplinary counsel or by the full-time deputy disciplinary counsel.

C. Designation of hearing officer or committee and notice. Upon filing of the specification of charges, the chair of the Disciplinary Board, or the chair's designee, shall forthwith designate a hearing officer or a hearing committee to hear the matter, and shall mail copies of the specification of charges to the hearing officer or to the members of the committee. The chair shall issue a formal notice to the respondent-attorney which shall advise the respondent-attorney that formal charges of unprofessional conduct have been instituted against the respondent-attorney and referred for hearing to a hearing officer or hearing committee giving the names and addresses of the members thereof and identification of its chair. The notice shall formally advise the respondent-attorney of the following:

(1) the right to file an answer to the specification of charges;

(2) the facts alleged in the specification of charges shall be deemed admitted if not specifically denied by answer or if no answer is filed within the prescribed time, in which event the sole issue to be determined by the hearing officer or committee shall be the nature of the officer's or committee's recommendation of discipline to the Disciplinary Board after consideration of any facts in aggravation or mitigation of the respondent-attorney's fault;

(3) the respondent-attorney has the right to be represented by counsel, to appear at all hearings, to confront and cross-examine the witnesses and to present relevant evidence in the respondent-attorney's own behalf;

(4) the right to the assistance of subpoenas to be issued at the respondent-attorney's request and to discovery in accordance with these rules; and

(5) within ten (10) days of receipt of notification of the designation of the members of a hearing committee, the respondent-attorney has the right to object to the qualification of the hearing officer or any member of the hearing committee setting forth facts which establish that such member cannot impartially decide the matter. Any objection to the qualification of any member of the hearing committee to sit and deliberate upon the matter must be filed with the committee chair and will be passed upon by members of said committee in the exercise of their sound discretion. Any objection to the qualification of a hearing officer shall be to the chair of the Disciplinary Board. A hearing officer or any member of a hearing committee who feels unable to sit impartially in any disciplinary proceeding may withdraw upon the filing of a notice of recusal stating the reasons for the recusal.

D. Service. Service of the specification of charges and formal notice shall be made upon the respondent-attorney in the manner prescribed by these rules. A copy of any procedural rules adopted by

the Supreme Court or Disciplinary Board which have not been published in the NMRA shall be served on the respondent-attorney with the specification of charges. If service is by mail it shall be by certified mail, return receipt requested, directed to the respondent-attorney's address of record in the office of the clerk of the Supreme Court and shall be complete upon receipt by the respondent-attorney, or five (5) days after service or mailing, whichever is earlier.

EXHIBIT E
BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

SPECIFICATION OF CHARGES

1. Rule 17-105(B)(3)(d) of the New Mexico Supreme Court Rules Governing Discipline empowers counsel for the Disciplinary Board to file a specification of charges against in attorney with the Disciplinary Board.

2. Stuart L. Stein, Esq., hereinafter respondent, is an attorney licensed to practice Law before the courts of the State of New Mexico.

3. The factual allegations set forth in the Specification of Charges state acts of professional misconduct by the Respondent in violation of Rules 16-102(D),16-107(A), 16-107(B), 16-109(A), 16-301; 16-303(A)(2), 16-303(A)(3), 16-401(B), 16-402, 16-803(D), 16-804(C), 16-804(D) and 16-804(H) of the Rules of Professional Conduct.

4. Pursuant to Rule 17-309(A) of the Supreme Court Rules Governing Discipline, cause exists to conduct a hearing on the following charges so that the Disciplinary Board and the Supreme Court can determine whether further action is appropriate.

5. In March, 2005, a Petition was filed by Cathe Temmerman seeking the appointment of a guardian and conservator for her father, Bruce C. Clinesmith, in the matter entitled *In the Matter Bruce C. Clinesmith, An Adult Incapacitated Person,* No. PQ-2005-00063 in the Second Judicial District Court, Bernalillo County, New Mexico. Richard Reidy was appointed guardian *ad litem* by the court on March 4, 2005.

6. By operation of law, after notice of the filing of a petition seeking the appointment of a conservator, the court in which the petition is filed has exclusive jurisdiction to determine how the estate of the protected person shall be managed, expended or distributed (45-5-402 NMSA 1978).

7. At the time of the filing of the Petition there were in existence two trusts created by Bruce Clinesmith. One of the trusts was a revocable trust created by Bruce Clinesmith on January 31, 1997, with Moody Bible Institute of Chicago (hereinafter the "1997 Trust") as Trustee and which provided, *inter-alia,* for the income and principal to be paid to Bruce Clinesmith as needed with the remainder to Moody upon his death. The corpus of the Moody trust was $6,275,000.00.

8. The other trust (hereinafter the "1999 Trust") was a revocable trust created by Bruce Clinesmith on October 29, 1999, the income and principal of which were to be paid to Bruce Clinesmith as required and upon his death the remainder was to be held in trust

for his wife, Ruth, with the income and principal to be paid to her as required. Upon Ruth's death, the remainder to be paid to Moody. The corpus of the 1999 trust was $4,800,000.00.

9. Respondent appeared on behalf of Bruce C. Clinesmith and his wife, Ruth Clinesmith in Cause No. PQ-2005-00063 and on March 28, 2005, filed an Answer to the Petition on behalf of Bruce Clinesmith and Ruth Clinesmith requesting that Ruth Clinesmith be appointed as guardian for Bruce Clinesmith, if in fact the court determined a guardian should be appointed. The Answer further alleged the existence of a Durable Power of Attorney executed by Bruce Clinesmith on January 30, 2004, in favor of his wife and stated that the court should not disregard the clear intent of Bruce Clinesmith, presumably as evidenced by the Power of Attorney.

10. On March 28, 2005, the same date on which respondent filed an Answer to the guardianship/conservatorship Petition, respondent wrote to representatives of the Moody Bible Institute of Chicago demanding that the income and corpus of the 1997 Trust and the 1999 Trust be paid to Ruth Clinesmith, individually.

11. Notwithstanding his knowledge of the pendency of the guardianship and conservatorship proceeding in state district court together with the above-cited statute, respondent filed two lawsuits in the United States District Court for the District of New Mexico on behalf of Ruth Clinesmith seeking to affect the

manner in which the estate of Mr. Clinesmith would be managed, expended and distributed.

12. The first lawsuit was filed on June 15, 2005 on behalf of Ruth Clinesmith, individually, and purportedly on behalf of Bruce C. Clinesmith, "by Ruth M. Clinesmith, his attorney-in-fact" pursuant to the January 30, 2004, Durable Power of Attorney referred to above, seeking *inter-alia* that the trusts created by Bruce Clinesmith in favor of Moody Bible Institute of Chicago be voided and that the corpus of the trusts be declared to be community property. This lawsuit will be referred to herein as the Moody Bible lawsuit. The value of the trusts at the time of filing was alleged to be approximately $11,000,000.00.

13. The second lawsuit was filed on June 22, 2005, on behalf of Ruth Clinesmith, individually, against Citigroup Global Markets, Inc. (the Citigroup lawsuit) alleging the existence of a joint account in the names of Bruce Clinesmith and Ruth Clinesmith and that the account was restricted by Citigroup without authority. In the lawsuit, Ruth Clinesmith sought damages or, in the alternative, full access to the account.

33 The account, which was alleged to be in the approximate amount of $250,000.00, was "frozen" by Citigroup because of their concerns that Bruce Clinesmith's mental health had deteriorated and their uncertainty that he fully comprehended his actions.

34. Respondent negotiated a settlement of the Citigroup suit pursuant to which the account in

question was to be transferred to an account with another broker, which account was in the name of Ruth Clinesmith only, thus cutting off Bruce Clinesmith's access to the account and the funds on deposit therein. The settlement was confirmed in a letter sent by respondent to Citigroup Associate General Counsel on July 13, 2005, forwarding a copy of the power of attorney in response to their request. The letter also confirmed Citigroup's representation that the freeze on the account would be lifted and that the case was "effectively settled upon the account being transferred to another broker. . . ."

35. July 15, 2005, respondent again contacted Citigroup by letter advising of the account to which the funds were to be transferred and again on July 28, 2005 complaining of delay in effectuating the transfer.

36. In none of these letters or other verbal communications between respondent and Citigroup did respondent advise Citigroup of the following:

a. A Verified Petition For The Appointment Of A Guardian And Conservator for Bruce Clinesmith had been filed in state District Court on March 4, 2005 and that a Guardian Ad Litem had in fact been appointed for Bruce Clinesmith by the court on that date;

b. On June 3, 2005, the court in which the guardianship proceeding was pending issued a Notice scheduling a hearing on July 18, 2005 to determine whether a guardian and

conservator should be appointed for Bruce Clinesmith;

c. On June 27, 2005, the court in which the guardianship proceeding was pending issued a Notice of Hearing scheduling a pending Motion To Disqualify respondent from representing Bruce C. Clinesmith because of a conflict of interest between him and his wife, Ruth Clinesmith.

d. On July 18, 2005, a hearing on the pending matters was held and the court granted the Motion to Disqualify respondent from representing Bruce Clinesmith in both the guardianship/conservatorship proceeding and in the lawsuit against the Moody Bible Institute because representing both Ruth Clinesmith and Bruce Clinesmith constituted an impermissible conflict of interest.

e. In the course of the July 18, 2005 hearing, the court also appointed Decades, LLC as full temporary guardian and temporary conservator for Bruce Clinesmith and revoked the durable power of attorney of January 20, 2004 pursuant to which Bruce Clinesmith had appointed Ruth Clinesmith as his attorney in fact.

37. During the course of the July 18, 2005, hearing respondent stated on the record: "I agree that Mr. Clinesmith is incapacitated to the extent that he may need a guardian or conservator."

38. In the complaint prepared and filed by respondent in the Moody Bible suit, he alleged that in

August 2004, Mr. Clinesmith was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis."

39. On August 18, 2005, after respondent had been disqualified from representing Bruce Clinesmith and after Decades LLC had been appointed temporary guardian and conservator of Bruce Clinesmith and notwithstanding his own recognition of Bruce Clinesmith's incapacity, respondent went to the dementia unit of the Woodmark, a residential care facility in which Bruce Clinesmith was a patient. Respondent had Bruce Clinesmith removed from the dementia unit and taken to a private room, where he presented Bruce Clinesmith with a new will and trust which he asked Bruce Clinesmith to execute and which Bruce Clinesmith did in fact execute.

40. Respondent did not notify Richard Reidy, the guardian *ad litem*, or Decades LLC, the temporary guardian and conservator, of his visit to Brice Clinesmith either before or after the visit nor did respondent obtain leave of court to make the visit to Bruce Clinesmith.

41. Upon learning of respondent's meeting with Bruce Clinesmith and Bruce Clinesmith's execution of the will and trust prepared by respondent, Decades LLC filed a Motion To Prohibit Interference With Temporary Guardian And Conservator Decades, LLC's Performance Of Duties And Exercise Of Powers Pursuant To Court Order Dated August 5, 2005, And Request For Emergency Expedited Hearing.

42. The court held a hearing of the Decades, LLC Motion on August 22, 2005, and entered an Order, *inter-alia*, enjoining respondent from having any contact with Bruce Clinesmith, voiding the will and trust executed by Bruce Clinesmith on August 18, 2005, and awarding Decades, LLC the attorneys' fees incurred by it in connection with the Motion.

43. On September 1, 2005, by Order of that date, the court in the guardianship and conservatorship proceeding disqualified respondent from any continued representation of Ruth Clinesmith. The grounds for the disqualification were that respondent formerly represented Bruce Clinesmith, that the continued representation of Ruth Clinesmith was substantially related to the representation of Bruce Clinesmith, and that the interests of Ruth Clinesmith are materially adverse to those of Bruce Clinesmith.

44. Respondent did not advise the federal court in the Moody Bible lawsuit of the entry of the July 18, 2005 Order revoking the power of attorney (pursuant to which he purported to represent the interests of Bruce Clinesmith in that matter) and disqualifying him from representing the interests of Bruce Clinesmith in that proceeding as well as in the guardianship/conservatorship proceeding.

45. Respondent did not advise the federal court in the Moody Bible lawsuit of the September 1, 2005, Order entered in the guardianship and conservatorship proceeding disqualifying him from representing Ruth Clinesmith.

46. Notwithstanding the Orders of July 18 of September 1, 2005, respondent continued to represent Ruth Clinesmith in the Moody Bible lawsuit and continued to purport to represent the interests of Bruce Clinesmith in that lawsuit as well.

47. On November 21, 2005, an Order was entered by the United States District Court in the Moody Bible suit disqualifying respondent from representing any party to that action for the same reasons that he was disqualified by Judge Vanzi in her Order of September 1 in the guardian and conservatorship proceeding.

48. By reason of the foregoing conduct respondent violated the following Rules of Professional Conduct:

a. Rule 16-102(D) by assisting a client (Ruth Clinesmith) to engage in conduct he knew was fraudulent or misleading to the court;

b. Rule 16-107(a) by representing Ruth Clinesmith whose interests were adverse to those of another client (Bruce Clinesmith).

c Rule 16-107(B) by representing a client (Bruce Clinesmith) where the representation of that client was materially limited by his representation of another client (Ruth Clinesmith);

d. Rule 16-109(A) by representing a person (Ruth Clinesmith) in the same or a substantially related matter in which that person's interests were materially adverse to those of

a former client (Bruce Clinesmith) and without the consent of the former client;

e. Rule 16-301 by bringing a proceeding that was frivolous;

f. Rule 16-303(A)(2) by failing to disclose a material fact to a tribunal when the disclosure was necessary to avoid assisting a client in a fraudulent act;

g. Rule 16-303(A)(3) by failing to disclose to a tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client (Ruth Clinesmith) and not disclosed by opposing counsel;

h. Rule 16-401(B) by failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client;

i. Rule 16-402 by communicating during the representation of a client about the subject of the representation with a party he knew to be represented by another lawyer in the matter without the consent of the other lawyer and without authorization of law to do so;

j. Rule 16-804(C) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

k. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice and

l. Rule 16-804(H) by engaging in conduct adversely reflecting on respondent's fitness to practice law.

FACTORS IN AGGRAVATION

49. Respondent was disciplined by the issuance of a Formal Reprimand on November 18, 2005 for substantially similar conduct involving a conflict of interest in violation of Rule 16-107(A) of the Rules of Professional Conduct. *ABA Standards For Imposing Lawyer Sanctions,* Standard 9.22(a).

50. Respondent has engaged in a pattern of misconduct constituting multiple offenses. *ABA Standards For Imposing Lawyer Sanctions,* Standard 9.22(d).

51. Respondent has refused to acknowledge the wrongful nature of his conduct, *ABA Standards For Imposing Lawyer Sanctions* Standard 9.22(g).

52. Bruce Clinesmith, the person adversely affected by the conduct of respondent, is suffering from advanced dementia and was and continues to be under the protection of a court appointed guardian. *ABA Standards For Imposing Lawyer Sanctions*, Standard 9.22(h).

53. Respondent has substantial experience in the practice of law. *ABA Standards For Imposing Lawyer Sanctions* Standard 9.22(i).

54. The names and addresses of all witnesses to Count III presently known to the Disciplinary Board are:

James S. Goddard, Esq.
Citigroup Global Market
77 Water St., 9th Flr.
New York, NY 10005

Catherine S. Combs
c/o Nell Graham Sale, Esq.
PO Box 25687
Albuquerque, NM 87125-0687

Barbara J. Singer
c/o Nell Graham Sale, Esq.
PO Box 25687
Albuquerque, NM 87125-0687

Richard M. Reidy, Esq.
4010 Carlisle, NE
Albuquerque, NM 87107-4532

Spencer W. Reid, Esq.
201 Third St., NW
Albuquerque, NM 87102

Gregory W. MacKenzie, Esq.
10590 Second Street NW, #C
Albuquerque, NM 87114

Stuart L. Stein, Esq.
2155 Louisiana Blvd., NE
Ste. 2200
Albuquerque, NM 87110

One or more of these witnesses may be called telephonically.

It is expected that this matter will be prosecuted by Joel L. Widman, Deputy Disciplinary Counsel.

WHEREFORE, by reason of the foregoing, it is respectfully requested pursuant to Rule 17-309 NMRA 2004 that a hearing committee be designated to hear evidence and make findings of fact and recommendations to the Disciplinary Board and, if any fo the charges are sustained, that Respondent be disciplined and assessed costs of this proceeding.

Respectfully submitted,

/s/ Joel L. Widman
Joel L. Widman, Deputy Disciplinary Counsel
PO Box 1809
Albuquerque, NM 87103-1809
505-842-5781

Date: Feb 22, 2006

EXHIBIT F

N.M.R.A. 17-310 (2008) Answer

A. Contents. The answer of the respondent-attorney shall contain the following:

(1) a brief and plain statement by the respondent-attorney reflecting the respondent-attorney's admissions, denials and any other relevant and material matter that the respondent-attorney wishes to convey concerning each of the factual charges against the respondent-attorney;

(2) any matter in mitigation; and

(3) the names and addresses of the witnesses that the respondent-attorney proposes to call in the respondent-attorney's defense.

B. Filing and service. Within twenty (20) days after service of the specification of charges, the respondent-attorney may file an answer to the charges. The answer shall be filed with the chair of the hearing committee. Copies shall be served upon the members of the designated hearing committee and opposing counsel. Service may be by mail.

C. Failure to answer. If the respondent-attorney fails to answer the charges within twenty (20) days, in accordance with Paragraph B, or if the charges are not specifically denied in the answer, the charges will be deemed admitted. In this event, the sole issue to be determined by the hearing committee shall be the nature of the committee's recommendation to the

Disciplinary Board after consideration of any facts in aggravation or mitigation of the respondent-attorney's misconduct.

EXHIBIT G

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO

Case Number: 02-2006-505

IN RE:

STUART L. STEIN, ESQ.,

An Attorney Admitted to the Bar of the Supreme Court of New Mexico,

Respondent. /

ANSWER AND COUNTERCLAIM

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and serves this Answer and Counterclaim and in support thereof states as follows:

ANSWER

1. That Respondent hereby ADMITS the allegations contained in paragraph 1 of the Specification of Charges.

2. That Respondent hereby ADMITS the allegations contained in paragraph 2 of the Specification of Charges.

3. That Respondent hereby DENIES the allegations contained in paragraph 3 of the Specification of Charges and demands strict proof thereof.

4. That Respondent hereby DENIES the allegations contained in paragraph 4 of the Specification of Charges and demands strict proof thereof.

5. That Respondent has no knowledge of all the allegations contained in paragraph 5 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

6. That Respondent hereby ADMITS the allegations contained in paragraph 6 of the Specification of Charges in that N.M.S.A § 45-5-402 speaks for itself but that there is no restriction in such statute for the preparation of testamentary instruments.

7. That Respondent has no knowledge of all the allegations contained in paragraph 7 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the trust document speaks for itself.

8. That Respondent has no knowledge of all the allegations contained in paragraph 8 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the trust document speaks for itself.

9. That Respondent has no knowledge of all the allegations contained in paragraph 9 of the Specification of Charges and therefore DENIES same and

demands strict proof thereof and further states that the pleading referenced speaks for itself.

10. That Respondent has no knowledge of all the allegations contained in paragraph 10 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the writing referenced speaks for itself.

11. That Respondent has no knowledge of all the subjective allegations contained in paragraph 11 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that pleadings in cases filed in the United States District Court speak for themselves.

12. That Respondent has no knowledge of all the subjective allegations contained in paragraph 12 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that pleadings filed in the United States District Court speak for themselves.

13. That Respondent has no knowledge of all the subjective allegations contained in paragraph 13 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that pleadings filed in the United States District Court speak for themselves.

14 to 32. That there are no paragraphs numbered 14 to 32 in the Specification of Charges, but the hearing committee in this cause did not allow the Motion to Dismiss to require that the this error be

corrected in an Amended Complaint. Should there be a hidden or unrevealed paragraph(s) 14 through 32, Respondent hereby DENIES the allegations contained in such paragraph(s) of the Specification of Charges and demands strict proof thereof.

33. That Respondent has no knowledge of all the allegations contained in paragraph 33 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

34. That Respondent has no knowledge of all the allegations contained in paragraph 34 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

35. That Respondent has no knowledge of all the allegations contained in paragraph 35 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the writing referenced speaks for itself.

36. That Respondent hereby DENIES the allegations contained in paragraph 36 of the Specification of Charges and demands strict proof thereof.

37. That Respondent has no knowledge of all the subjective allegations contained in paragraph 37 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that transcript of the proceedings reference would be the best evidence of what occurred or what was said, subject to clarification.

38. That Respondent has no knowledge of all the allegations contained in paragraph 38 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and, further, that the pleading referenced in this paragraph.

39. That Respondent hereby DENIES the allegations contained in paragraph 39 of the Specification of Charges and demands strict proof thereof.

40. That Respondent hereby DENIES the allegations contained in paragraph 40 of the Specification of Charges and demands strict proof thereof.

41. That Respondent has no knowledge of all the allegations contained in paragraph 41 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

42. That Respondent has no knowledge of all the allegations contained in paragraph 42 of the Specification of Charges and therefore DENIES same and demands strict proof thereof and further states that the record of the hearing and the Orders entered thereon will speak for themselves.

43. That Respondent hereby DENIES the allegations contained in paragraph 43 of the Specification of Charges and demands strict proof thereof and further states that the record of the hearing and the Orders entered thereon will speak for themselves.

44. That Respondent has no knowledge of all the allegations contained in paragraph 44 of the

Specification of Charges and therefore DENIES same and demands strict proof thereof.

45. That Respondent has no knowledge of all the allegations contained in paragraph 45 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

46. That Respondent has no knowledge of all the allegations contained in paragraph 46 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

47. That Respondent has no knowledge of all the allegations contained in paragraph 47 of the Specification of Charges and therefore DENIES same and demands strict proof thereof.

48. That Respondent hereby DENIES the allegations contained in paragraph 48 of the Specification of Charges and demands strict proof thereof.

49 to 53. That Respondent hereby DENIES the allegations of factors in aggravation contained in paragraph 49 through 53 of the Specification of Charges and demands strict proof thereof.

54. That no response is required for the listing of the witnesses in paragraph 54 of the Specification of Charges.

WHEREFORE the Specification of Charges should be **DISMISSED** with prejudice.

WITNESSES

NOTICE IS HEREBY GIVEN that Respondent may call the following witnesses at the final hearing on the matter:

All witnesses listed by Petitioner

Marvin E. Beckman, Esq.
Moody Bible Institute
820 North LaSalle
Boulevard Chicago, IL 60610

Mr. Michael Easley
President
Moody Bible Institute
1 LaSalle Street
Chicago, IL 60610-3284

Hon. Linda Vanzi
District Judge
Civil Division
Post Office Box 488
Albuquerque, NM 87103

Nell Graham Sale, Esq.
Ruth O. Pregenzer, Esq.
Robin A. Goble, Esq.
Miller Stratvert, P.A.
Post Office Box 25687
Albuquerque, NM 87125-0687

David L. Walther, Esq.
Walther Family Law
Suite 620
6501 Americas Parkway
Albuquerque, NM 87110

William K. Summers, M.D.
6000 Uptown Blvd
Albuquerque, NM 87110

Mrs. Ruth Clinesmith
xxxx xxxx xx
Albuquerque, NM 87110

Mrs. Devina Delaney
xxxx xxxx xx
Albuquerque, NM 87110

Ms. Elizabeth I. Brown
xxxx xxxx, xx xx
Albuquerque, NM 87109

C. David Henderson, Esq.
Downing & Henderson
Suite B-5
2074 Galisteo Street
Santa Fe, NM 87505-2157

Joel L. Widman, Esq.
Deputy Disciplinary Counsel
Post Office Box 1809
Albuquerque, NM 87103-1809

Virginia L. Ferrara, Esq.
Chief Disciplinary Counsel
Post Office Box 1809
Albuquerque, NM 87103-1809

Leonard E. Leetznow, Jr.
Suite 1100
2 North Tamiami Trail
Sarasota, FL

COUNTERCLAIM CHALLENGING THE METHOD OF NEW MEXICO ATTORNEY DISCIPLINE AS CONSTITUTIONALLY INFIRM

COMES NOW Respondent Stuart L. Stein, Esq., by and through the undersigned firm, and serves this Counterclaim Challenging the Method of New Mexico Attorney Discipline as Constitutionally Infirm and requests a declaratory judgment declaring same and prohibiting further action on the instant Specification of Charges and any other Specification of Charges to be brought in the future, if any, and in support thereof states as follows:

1. That the entire scheme of the procedure in attorney disciplinary proceedings before the New Mexico Supreme Court, the Disciplinary Board and its hearing committees and reviewing officers as currently established under Rule 17-101, *et seq.*, RGD are institutionally infirm under the Fifth and Fourteenth Amendments of the United States Constitution. That the basis for this conclusion is outlined in the following paragraphs:

A. That hearing committees and hearing officers are appointed by the Disciplinary Board upon its own recommendations, Rule 17-104.A. The process is not public and the criteria for selection of members of hearing committees or hearing officers is not part of the RGD.

B. That there are no specific rules of procedure in disciplinary matters in which an accused attorney can turn to know how a particular matter

will be handled. Rule 17-301.B, RGD, incorporating the Rules of Civil Procedure for the District Court's "except where clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by" the RGD is fatally flawed since any attorney charged in a Specification of Charges should be able to know, absolutely, the rules of procedure upon which their continued use of their license to practice will be determined.

C. That not strictly applying the Rules of Evidence denies an accused attorney the necessary notice to determine what evidence will be admitted and what will not be admitted, thus making adequate preparation for formal hearing virtually impossible. Further, the question of the evidentiary proof of matters is unclear. Disciplinary counsel considers that the proof necessary for all violations of the Rules of Professional Conduct other than false or fraudulent conduct is preponderance of the evidence. False or fraudulent conduct is proved by clear and convincing evidence. Since attorney discipline matters are quasi-criminal in nature, the level of proof required on all matters to pass constitutional muster is "clear and convincing". Such is required for judicial discipline. See, Rule 30 of the New Mexico Judicial Standards Commission. As a matter of public policy, for the protection of the rights of judges to judicial office or the rights of lawyers to continue their private practice, the burdens of proof for discipline should be identical. The potential harm of a wayward judge to the public is infinitely higher than the harm to be caused by a wayward lawyer.

D. That the investigative advantage or disciplinary counsel to obtain information from attorneys, including from a respondent attorney, over the targeted attorney is fatal to a fair system. Disciplinary counsel consistently reminds target attorneys and attorney witnesses of their affirmative duty and responsibility under Rule 16-803.D to cooperate with them in all investigations. The subjective opinion of disciplinary counsel that an attorney is "non-cooperative" can lead to the filing of formal charges. Such attorneys who cooperate with disciplinary counsel consistently refuse to cooperate in the same fashion with targeted attorneys and/or their counsel.

E. That a further investigative advantage of disciplinary counsel to obtain information is that they have four years, in most cases, in which to conduct an investigation until they are faced with the statute of limitations issue under Rule 17-303 RGD. During this period of time disciplinary counsel can propound an unlimited number of interrogatories to the respondent attorney. Rule 17-306.A.(1) RGD. During this period of time disciplinary counsel can obtain under power of subpoena the deposition, documents and records of the respondent attorney and other witnesses. Rule 17-306.A.(2) RGD. Respondent Attorney has nothing equivalent whatsoever under the RGD for his or her own investigation during this period prior to the filing of a formal specification of charges.

F. That disciplinary counsel consistently violates Rule 17-307.C by ignoring the requirement to advise the respondent attorney of the allegations

contained in a specification of charges prior to their filing by claiming that sending a copy of the written complaint filed with the office of the disciplinary board is adequate compliance with this rule. In the instant Specification of Charges there are claimed violations of eight the Rules of Professional Conduct that were not mentioned in the complaint initially filed with the Disciplinary Board. Therefore, this Respondent had no ability to present any matter of fact or mitigation he wanted disciplinary counsel to consider. It is verily believed that disciplinary counsel has never asked for the consent of any respondent attorney to join with him or her to conduct an informal hearing allowing the parties to present evidence and witnesses.

G. That disciplinary counsel alone determines if a file should be reviewed by a reviewing officer. Rule 17-307.D, RGD. A respondent-attorney may not elect to seek this review prior to the filing of a specification of charges under Rule 17-309.A, RGD.

H. That there is no assurance that any determination of the hearing committee or the appeal from any determination of the review of a committee of the Disciplinary Board is given any plenary review by any duly constituted judge or court.

I. That there are other flaws in the attorney disciplinary system that will be uncovered during discovery.

2. That Disciplinary Counsel fails to follow even the infirm Rules of Discipline, as outlined above, to

the disadvantage of this individual Respondent and all Respondents who face filed Specification of Charges.

3. That in light of the foregoing, the entire disciplinary system is in violation of the Fifth and Fourteenth Amendment to the United States Constitution as applied to Respondent.

WHEREFORE, Respondent prays for the following relief:

A. That upon adequate discovery, declare that the attorney disciplinary system in New Mexico is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. Bifurcate the hearing on the Specification of Charges and the Counterclaim, allowing the Counterclaim to move forward first.

C. That upon the success of the Counterclaim, dismiss all pending Specification of Charges until the attorney disciplinary system will meet constitutional muster.

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, N.E., Building 2, Suite 207, Albuquerque, NM 87110, Ms. Carolyn Tinker, xxxx xxxx xxxx xx, Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq., Deputy

Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this July 3, 2006.

THE STEIN LAW FIRM
Attorney for Respondent
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by /s/ Stuart L. Stein
Stuart L. Stein

EXHIBIT H

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

ORDER DENYING CHALLENGE TO APPOINTED PANEL

This matter having come before the Hearing Committee designated to hear the above captioned cause, pursuant to Rule 17-309(C)(5) of the Rules Governing Discipline, and the Hearing Committee having fully considered the Challenge to Appointed Counsel, the brief submitted by Disciplinary Counsel in Response to Challenge to Appointed Panel and the Reply filed by Respondent, and being otherwise fully informed in premises,

FINDS

1. Respondent's claim that it is improper for this Hearing Committee to consider charges in the above captioned case because the same Hearing Committee considered and decided charges against Respondent in Disciplinary No. 06-2003-458 is without merit, there being no prohibition in the Rules of

Procedure Governing Discipline against such a practice.

2. Respondent's claim that in prior disciplinary proceedings against him heard by this Hearing Committee he was denied due process of law under the Fourth and Fifteenth amendments to the Constitution of the United States is a matter to have been determined in the prior proceeding and is otherwise without merit.

3. Respondent's allegations concerning the conduct of individual members of the Hearing Committee in the prior proceeding are matters which should have been raised and decided in the prior proceeding, and are otherwise without any basis in fact.

4. The inclusion of aggravating factors in the specification of charges in this case does not unduly prejudice the Hearing Committee and does not deprive Respondent of a fair and impartial forum.

5. The inclusion of a lay member on the Hearing Committee designated to hear this cause does not deprive Respondent of a fair and impartial hearing.

6. Respondent's Challenge to Appointed Panel is otherwise without merit.

It is therefore ORDERED that Respondent's Challenge to Appointed Panel should be and hereby is denied.

Dated this 24th day of April 2006.

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee Chair
for the Hearing Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2006, I mailed the foregoing Order to the following:

Sasha Siemel, Chair
Disciplinary Board of the Supreme Court
P.O. Box 607
Albuquerque, NM 87103-0607

Joel L. Widman
Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
Albuquerque, NM 87103-1809

Stuart Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Disciplinary No. 02-2006-505

ORDER DENYING SECOND CHALLENGE TO APPOINTED PANEL

This matter having come before the Hearing Committee on Respondent's Second Challenge to Appointed Panel and the Hearing Committee having considered the Motion, and being otherwise fully advised in the premises,

FINDS:

1. On June 2, 2006, the Hearing Committee Chair instructed his administrative assistant to contact Disciplinary Counsel's office to ascertain whether Disciplinary Counsel had received Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and/or Motion for Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline under Rule 1-007.1.D for Failure to Respond.

2. The Hearing Committee Chair's legal assistant reported a conversation with Disciplinary Counsel's staff in which she was informed that

Disciplinary Counsel's office stated that the May 22, 2006 had not been received. At the request of the Disciplinary Counsel's office a copy of said Motion was telefaxed to Disciplinary Counsel.

3. There was no other communication or contact, direct or indirect, between any member of the Hearing Committee and Disciplinary Counsel's staff concerning this matter.

4. Inquiring as to whether a pleading has been received by counsel does not constitute an impermissible *ex parte* contact.

It is, therefore, ORDERED that Respondent's Second Challenge to Appointed Panel be and hereby is denied.

Dated this 22nd day of June, 2006.

By: /s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee Chair
for the Hearing Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June 2006, I mailed the foregoing Order to the following:

Joel L. Widman
Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
Albuquerque, NM 87103-1809

Stuart Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.

EXHIBIT I

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to Practice Before the Court of the State of New Mexico

Disciplinary No. 02-2006-505

ORDER DENYING RESPONDENT'S ALTERNATIVE MOTION TO DISMISS SPECIFICATION OF CHARGES, RESPONDENT'S MOTION FOR GRANTING THE APRIL 29, 2006 ALTERNATIVE MOTION TO DISMISS SPECIFICATION OF CHARGES AND SETTING TIME FOR FILING OF ANSWER, AND RESPONDENT'S REQUEST FOR HEARING ON PENDING MOTIONS

This matter having come before the Hearing Committee on Respondent's Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline, dated April 29, 2006 and Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and/or More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline under Rule 1-007.1.D for Failure to Respond, dated May 22, 2006; the Hearing

Committee having considered the Motions, Disciplinary Counsel's Memorandum in Response to said motions and Respondent's Reply, as well as Respondent's Request for Hearing on Pending Motions, and being otherwise fully advised in the premises,

FINDS:

1. Said Motions are without merit and should be denied.

2. While the Committee believes that the fifteen day time limit prescribed by Rule 1-007.1 of the Rules of Civil Procedure is applicable in disciplinary proceedings because said rule is not "clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by. . . . " the Rules Governing Discipline, the issue is not beyond debate and the Committee should exercise its discretion in favor of resolving the issues raised in this case by a hearing on the merits.

It is, therefore, ORDERED that

A. Respondent's Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Dismissal for Failure to Follow the Rules Governing Discipline and Respondent's Motion for Granting the April 29, 2006 Alternative Motion to Dismiss Specification of Charges and/or Motion for More Definite Statement and/or Failure to Follow the Rules Governing Discipline under Rule 1-007.1.D for Failure to Respond should be and hereby are denied.

B. The Committee's ruling with regard to these pending motions alleviates any necessity for a hearing, so that Motion is also denied.

C. Respondent is granted until June 30, 2006 to file his Answer to the Complaint.

Dated this 22nd day of June, 2006.

By: /s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.
Hearing Committee Chair
for the Hearing Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June 2006, I mailed the foregoing Order to the following:

Joel L. Widman
Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
Albuquerque, NM 87103-1809

Stuart Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

/s/ Robert P. Tinnin, Jr.
Robert P. Tinnin, Jr.

EXHIBIT J

N.M.R.A. 17-311 (2005). Discovery.

Upon a written showing of need, either party may apply to the chairman of the hearing committee for permission to conduct discovery proceedings prior to the date set for formal hearing.

EXHIBIT K

[SEAL]

The Disciplinary Board
AN AGENCY OF THE SUPREME COURT OF
THE STATE OF NEW MEXICO

[Address And Phone Numbers Omitted In Printing]

CONFIDENTIAL

August 24, 2006

BY MESSENGER
Stuart L. Stein, Esq.
2155 Louisiana, NE Suite 2200
Albuquerque, NM 87110

Re: In the Matter of Stuart L. Stein
Disciplinary No. 02-2006-505

Dear Mr. Stein:

Enclosed are copies of the documents described in paragraphs 1 through 6 of the schedule attached to the subpoenas served on disciplinary counsel.

Very truly yours,

/s/ Joel L. Widman
Joel L. Widman
Deputy Disciplinary Counsel

1. All materials in your possession, including but not limited to books, records, files, letters concerning Ruth Clinesmith.

2. All materials in your possession, including but not limited to books, records, files, letters concerning Bruce Clinesmith.

3. All materials in your possession, including but not limited to books, records, files, letters concerning Bruce Clinesmith and Ruth Clinesmith.

4. All materials in your possession, including but not limited to books, records, files, letters concerning Ruth Clinesmith and Stuart L. Stein.

5. All materials in your possession, including but not limited to books, records, files, letters concerning Bruce Clinesmith and Stuart L. Stein.

6. All materials in your possession, including but not limited to books, records, files, letters concerning Bruce Clinesmith, Ruth Clinesmith and Stuart L. Stein.

7. All materials in your possession, including but not limited to books, records, files, letters written from or to Virginia L. Ferrara concerning Stuart L. Stein.

8. All materials in your possession, including but not limited to books, records, files, letters written from or to Joel L. Widman concerning Stuart L. Stein.

EXHIBIT L

IN THE MATTER OF
STUART L. STEIN, ESQUIRE

Docket No. 17,349

SUPREME COURT OF NEW MEXICO

2008 NMSC 13; 177 P.3d 513; 2008 N.M. LEXIS 97

February 20, 2008, Filed

COUNSEL: Joel L. Widman, Disciplinary Counsel, Albuquerque, NM, for Petitioner.

The Stuart Law Firm, Stuart L. Stein, Albuquerque, NM, for Respondent.

JUDGES: CHARLES W. DANIELS, Justice

OPINION BY: CHARLES W. DANIELS

OPINION

PER CURIAM.

[*1] This matter came before the Court to consider whether attorney Stuart L. Stein (Respondent) should be disbarred for violating the Rules of Professional Conduct through his actions associated with his representation of Bruce Clinesmith and his wife, Ruth Clinesmith. For the reasons that follow, we adopt the findings and conclusions of the hearing committee and adopt the recommendation of the disciplinary board to disbar Respondent from the practice of law.

I. BACKGROUND

[*2] These disciplinary proceedings commenced with a letter sent by the Honorable Linda M. Vanzi of the Second Judicial District Court, setting forth a complaint regarding Respondent's conduct in a proceeding seeking the appointment of a guardian and conservator for Bruce Clinesmith. The petition for appointment of a guardian and conservator was filed by Bruce's daughter, Cathe Temmerman, because of concerns about her father's emotional and financial well-being.

[*3] Respondent appeared on behalf of Bruce and Ruth, and other members of Ruth's family who purported to have an interest in the matter. Respondent filed an answer to the petition requesting that Ruth be appointed as guardian for Bruce, if in fact the court determined a guardian should be appointed. The answer further alleged the existence of a durable power of attorney executed by Bruce in favor of his wife and stated that the court should not disregard Bruce's clear intent, presumably as evidenced by the power of attorney. Upon the filing of the petition, the court appointed Richard Reidy as guardian *ad litem* for Bruce.

[*4] At the time of the filing of the petition in the guardianship case, there were two trusts in existence that were created by Bruce. One was a 1997 revocable trust (the 1997 trust), which provided for the income and principal to be paid to Bruce as needed, with the remainder payable upon his death to

the Moody Bible Institute of Chicago (Moody Bible). The corpus of this trust was $6,275,000.00. The second was a 1999 revocable trust (the 1999 trust), the income and principal of which were to be paid to Bruce. Upon his death, the remainder was to be held in trust for his wife. Upon Ruth's death, the remainder was to be paid to Moody Bible. The corpus of this trust was $4,800,000.00.

[*5] On the same date that Respondent filed his answer to the guardianship and conservatorship petition, Respondent wrote to the trustee, demanding that the income and corpus of the 1997 Trust and the 1999 Trust be paid to Ruth, individually. When the trustee refused the request, Respondent filed two lawsuits in the United States District Court for the District of New Mexico, which the hearing committee found would affect the manner in which Bruce's estate would be managed, expended, and distributed. Respondent took these actions notwithstanding his knowledge of the pendency of the guardianship and conservatorship proceeding and without notice to Bruce's guardian *ad litem*.

[*6] Respondent, as Bruce's and Ruth's attorney, filed the first federal lawsuit to void the trusts created by Bruce in favor of Moody Bible, and to have the funds declared community property. The Moody Bible lawsuit was filed on Ruth's behalf, individually, and purportedly on Bruce's behalf, "by Ruth M. Clinesmith, his attorney-in-fact," pursuant to the durable power of attorney.

[*7] Respondent filed the second federal lawsuit against Citigroup Global Markets, Inc., on behalf of Ruth in her individual capacity, alleging the existence of a joint account in the names of Bruce and Ruth that was restricted by Citigroup without authority. Citigroup had placed a freeze on the account because of its concerns that Bruce's mental health had deteriorated and because of its uncertainty that he fully comprehended his actions. In the Citigroup lawsuit, Ruth sought damages, or in the alternative, full access to the account. However, once again, Respondent did not notify Bruce's guardian *ad litem* of the filing of this lawsuit.

[*8] Significantly, neither lawsuit named Bruce as a plaintiff individually. Also, the two complaints filed by Respondent acknowledge Bruce's potential incapacity. The complaint prepared and filed by Respondent in the Moody Bible lawsuit alleges that in August 2004, when Bruce and Ruth relocated to Albuquerque, Bruce was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis." In the Citigroup complaint, Respondent states "[t]hat there is a current question about the competence of Bruce C. Clinesmith."

[*9] Although the Citigroup complaint requested Ruth's full access to the account as co-tenant with Bruce, Respondent negotiated a settlement which transferred the account to another broker, exclusively under Ruth's name, thus effectively precluding Bruce from accessing the account. During the negotiations Respondent produced a copy of the power of attorney

executed by Bruce in his wife's favor. The settlement was confirmed in letters sent by Respondent to Citigroup's associate general counsel. This conduct by Respondent resulted in the removal of assets in excess of $250,000.00 from the state district court's jurisdiction in the guardianship and conservatorship proceeding without notice to, or leave of, that court.

[*10] During a subsequent hearing Judge Vanzi considered a motion to disqualify Respondent from representing Bruce because of a conflict between his interests and those of Ruth. Of note, during the hearing, was Respondent's statement that "I agree that [Bruce] is incapacitated to the extent that he may need a guardian or conservator." Thereafter, the court disqualified Respondent from representing Bruce, revoked the power of attorney previously granted to Ruth by Bruce, and appointed Decades LLC temporary guardian and conservator of Bruce. The court set forth the following rationale for disqualifying Respondent from representing Bruce.

> The interests of Bruce C. Clinesmith and Ruth M. Clinesmith are adverse to each other in this proceeding and in the federal proceedings currently pending. Representing both individuals in these proceedings constitutes an impermissible conflict of interest and neither Stuart L. Stein, Esq. or The Stein Law Firm can continue to represent the interests of Bruce C. Clinesmith.

The court also ordered the court clerk to "issue letters of full temporary guardianship and temporary conservatorship to Decades LLC upon accepting its duties hereunder" and "in connection with its duties as temporary guardian and temporary conservator, Decades LLC shall consult with the Guardian Ad Litem and promptly retain counsel to represent Mr. Clinesmith's interests in the federal proceedings. . . ." Pursuant to this order, the attorney for Decades LLC sent a letter to Respondent advising him that Decades LLC, in its capacity as Bruce's temporary guardian and conservator, considered Respondent's representation of Bruce to be terminated effective July 18, 2005, and stated that the termination applied to all matters, including the guardianship and conservatorship case, the Moody Bible lawsuit, and the Citigroup lawsuit.

[*11] Respondent never advised the federal court in which the Moody Bible lawsuit was pending that he had been disqualified from representing Bruce, that the power of attorney had been revoked, or that a temporary guardian and conservator had been appointed for Bruce. Respondent continued to represent Bruce in the Moody Bible lawsuit after he was disqualified from doing so, by remaining attorney of record and filing a motion to vacate a scheduling order. In addition, at no time did Respondent advise Citigroup, to whom he negotiated a transfer of funds from Bruce to Ruth, that the power of attorney he previously produced had been revoked.

[*12] After being ordered to discontinue his representation of Bruce, Respondent went to the dementia unit of the Woodmark, a residential care facility in which Bruce was a patient, and had Bruce removed from the dementia unit and taken to a private room to execute a new will and trust which Respondent had prepared for Bruce's signature. The new will and trust sought to revoke the Moody Bible trusts and create a new trust with Ruth as trustee with all the power "that an absolute owner of such property would have." These documents had the additional effect of removing all of the assets belonging to Bruce from the jurisdiction of the court in the guardianship and conservatorship proceeding. Respondent did not notify the court, the guardian *ad litem,* or the temporary guardian and conservator of his intended visit with Bruce, or of his efforts to have Bruce sign a new will and trust.

[*13] Upon learning of the meeting and execution of the will and trust, Decades LLC filed a motion asking for an emergency hearing and seeking an order prohibiting Respondent from interfering with its duties as temporary guardian and conservator and preventing Respondent from having any contact with Bruce. The court held a hearing on the motion and Respondent admitted going to the Woodmark without notifying Decades LLC. Remarkably, he told the court that he "didn't have to" because it was not explicitly stated in the order. Respondent also admitted that he did not notify the guardian *ad litem*. When asked if it was his practice to approach incapacitated persons

without notifying the court-appointed guardian/conservator or any other person caring for the individual, Respondent stated, "[i]n this case this is what I did and I feel that it is fine. It is ethical, and not in contravention of your order. . . ." Thereafter, the court entered an order enjoining Respondent from having any contact with Bruce and voiding the will and trust executed by Bruce. The order states specifically that "Stuart L. Stein, Esq., The Stein Law Firm, and all members or staff of the Stein Law Firm are hereby enjoined from having contact with Bruce C. Clinesmith in any way, shape or form. . . ."

[*14] Shortly thereafter, the court disqualified Respondent from any continued representation of Ruth. The court found that "Mrs. Clinesmith's interests, and those of her family, are materially adverse to the interests of Mr. Stein's former client, Bruce Clinesmith" and that "[i]nformation relating to the representation of Mr. Clinesmith by Mr. Stein is being used to Mr. Clinesmith's disadvantage and to the advantage of Mrs. Clinesmith." Despite being disqualified from representing Ruth in state court, Respondent never advised the federal court in which the Moody Bible lawsuit was pending of his disqualification. In fact, Respondent continued to represent Ruth by filing a motion to vacate an initial scheduling order both on her behalf and on behalf of Bruce under Ruth's durable power of attorney. The federal court, however, disqualified Respondent from representing any party in the Moody Bible lawsuit for the same

reasons he was disqualified by Judge Vanzi in the guardianship and conservatorship proceeding.

[*15] By reason of the foregoing conduct, a specification of charges was filed by deputy disciplinary counsel pursuant to Rule 17-105(B)(3)(d) NMRA. The specification of charges detailed the conduct summarized above and alleged that such conduct violated many of the Rules of Professional Conduct. *See* Rules 16-107(A) and (B), 16-109(A), 16-804(C), (D), and (H), 16-102(D), and 16-402 NMRA.

[*16] Respondent's conduct in both the Moody Bible and the Citigroup lawsuits resulted in the hearing committee, after a full hearing, to conclude that Respondent had violated the following Rules of Professional Conduct: (1) Rule 16-107(A) by representing Ruth, whose interests were adverse to those of another client (Bruce); (2) Rule 16-107(B), in that Respondent represented a client (Bruce) where the representation of that client was materially limited by his representation of another client (Ruth); and (3) Rule 16-109(A) by his conduct in the Moody Bible lawsuit, in that Respondent represented a client (Ruth) in the same or a substantially related matter in which that person's interests were materially adverse to those of a former client (Bruce) and without the consent of the former client.

[*17] Based upon Respondent's conduct in the Moody Bible lawsuit, the Citigroup lawsuit, and his actions at the Woodmark, the hearing committee found violations of Rule 16-804(C), in that Respondent

engaged in conduct involving misrepresentation by neglecting to notify the courts and interested parties of the pending litigations, of the occurrences in the guardianship and conservatorship proceeding, and of his visit to Bruce and execution of a new will and trust. The hearing committee also found that Respondent's conduct in the aggregate violated Rule 16-804(D), in that he engaged in conduct prejudicial to the administration of justice, and Rule 16-804(H), in that he engaged in conduct adversely reflecting on his fitness to practice law. Because of Respondent's conduct in the Moody Bible lawsuit, the hearing committee also found that Respondent violated Rule 16-102(D) by assisting his client Ruth to engage in conduct he knew was misleading to the federal court.

[*18] Finally, the hearing committee found that by Respondent's actions in relation to the Woodmark visit, he violated Rule 16-402, by communicating directly with Bruce about executing a new will and trust without the consent of Bruce's newly-appointed lawyer.

[*19] The hearing committee recommended that Respondent be suspended from the practice of law for a period of six months with automatic reinstatement and that he pay costs. The findings and conclusions of the hearing committee were forwarded to the disciplinary board hearing panel for review. *See* Rule 17-314(A) NMRA (stating that the chair of the disciplinary board shall appoint a hearing panel upon receipt of the hearing committee's findings of fact, conclusions and recommendations). In its order and

decision, the hearing panel accepted and adopted the committee's findings and conclusions. The hearing panel found that Respondent "basically agreed with each Finding of Fact of the Hearing Committee with his limited objections being either stylistic or immaterial to the conclusions." However, the panel rejected the hearing committee's recommended discipline, and instead recommended to this Court that Respondent be disbarred from the practice of law for no less than five years and that he pay costs.

II. DISCUSSION

[*20] Respondent argues that there was a "complete failure of proof at the hearing committee level to prove any of the charges in the Specification of Charges." He specifically argues that there was no proof of any conflict of interest or misrepresentations created by representing both Bruce and Ruth in the guardianship and conservatorship case before Judge Vanzi and by his actions in the two federal cases. For the reasons that follow, we hold that there is substantial evidence to support the hearing committee's findings, and that those findings support the committee's conclusions that Respondent violated the conflict of interest and misrepresentation provisions of the Rules of Professional Conduct. We also hold that there is substantial evidence to support the committee's remaining findings, and that those findings support the remaining conclusions.

A. Standard of Review

[*21] The findings of the hearing committee are reviewed for substantial evidence and the conclusions of law are reviewed de novo. *See In re Bristol,* 2006 NMSC 41, ¶¶ 16-18, 140 N.M. 317, 142 P.3d 905 (per curiam); *In re Estrada,* 2006 NMSC 47, ¶ 7, 140 N.M. 492, 143 P.3d 731 (per curiam). Both the hearing panel and this Court look to see whether substantial evidence exists to support the hearing committee's decision. *See In re Bristol,* 2006 NMSC 041, ¶ 16, 140 N.M. 317, 142 P.3d 905.

B. Conflict of Interest

[*22] Under the New Mexico Rules of Professional Conduct, an attorney "should not represent a client whose interests are adverse to those of a present client, or whose interests are adverse to those of a former client on a matter that is the same or substantially related to the previous matter." *United States v. Gallegos,* 39 F.3d 276, 279 (10th Cir. 1994) (summarizing New Mexico's disciplinary rules regarding conflict of interest); *accord* Rule 16-107(A) and (B). An objective standard is used when determining whether the lawyer reasonably could believe that the representation of a client with interests adverse to those of another client would not adversely affect the lawyer's relationship with the other client. *See In re Houston,* 1999 NMSC 32, ¶ 12, 127 N.M. 582, 985 P.2d 752. As such, Respondent's subjective belief that

no conflicts existed is irrelevant. Viewed objectively, the facts speak for themselves.

[*23] Respondent purported to represent Bruce and Ruth in the guardianship and conservatorship proceeding before Judge Vanzi, yet filed two lawsuits in federal court seeking to drastically alter Bruce's estate in favor of Ruth. In the Moody Bible lawsuit, Respondent was representing Ruth individually, and purportedly Bruce, "by Ruth Clinesmith, his attorney-in-fact." Respondent was seeking to void the trusts created by Bruce and to have the corpus of the trusts declared community property. Ruth's interest in gaining control of the trusts was obviously adverse to Bruce's interest in keeping the trusts as he prepared them. With the filing and settlement of the Citigroup suit, Respondent was representing Ruth, individually, whose interests were adverse to Bruce's, violating Rule 16-107(A). Although the Citigroup complaint filed by Respondent requested Ruth's full access to the account as Bruce's co-tenant, Respondent negotiated the removal of the assets from Bruce and Ruth's joint account and the placement of those assets in an individual account in Ruth's name only. Ruth's interests were clearly adverse to Bruce's interests and Respondent was representing both of them, an obvious violation of Rule 16-107(A).

[*24] Additionally, Respondent's representation of Bruce was materially limited by his representation of Ruth, a violation of Rule 16-107(B). We have no difficulty seeing how representing Ruth limited Respondent's ability to represent Bruce. Ruth clearly

had an adverse interest in the outcome of the guardian and conservatorship proceeding and the federal suits, as each would affect her ability to control Bruce's finances. We agree with the hearing committee that Respondent should have seen the adverse implications of dual representation in this situation.

[*25] Furthermore, the complaint prepared and filed by Respondent in the Moody Bible lawsuit alleges that in August 2004, when Bruce and Ruth relocated to Albuquerque, Bruce was suffering from "early signs of dementia, be it Alzheimer's Disease or some other dementia diagnosis." Additionally, Respondent acknowledged in the complaint he filed in the Citigroup case that Bruce's competence was questionable. Accordingly, the court had appointed a guardian *ad litem* for Bruce before Respondent filed these lawsuits. Later, the court found that good cause existed to appoint a temporary guardian and conservator for Bruce and appointed Decades LLC in that capacity. What is so reprehensible to this Court is that Respondent, acknowledging that Bruce's mental capacity was in question, attempted to take money from him and transfer it to Ruth, while purporting to represent both of them. Certainly, Respondent's ability to represent Bruce was compromised.

[*26] Respondent argued before the hearing committee that any potential conflict was waived by both Bruce and Ruth and that Bruce was competent. However, as noted above, whether the lawyer reasonably could believe that the representation would not adversely affect the lawyer's relationship with the

other client is determined by an objective standard. *See In re Houston,* 1999 NMSC 32, ¶ 12, 127 N.M. 582, 985 P.2d 752. Applying the objective standard in *Houston,* we conclude that it was not reasonable for Respondent to believe these conflicts could be waived. As this Court said, "reasonable" means "the conduct of a reasonably prudent and competent lawyer." *In re Houston,* 1999 NMSC 32, ¶ 12, 127 N.M. 582, 985 P.2d 752. Simply put, a reasonably prudent lawyer would not have acted as Respondent did.

[*27] Through his actions in the Moody Bible lawsuit and the state court guardianship proceedings, Respondent also violated Rule 16-109(A), which provides "that [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." As noted in the federal order disqualifying Respondent from representing any party and from participating in any manner in the Moody Bible lawsuit, Bruce had an attorney-client relationship with Respondent, the Moody Bible lawsuit involved a matter substantially related to Respondent's prior representation of Bruce in the state court proceeding, and Ruth's interests were materially adverse to Bruce's interests. As such, Respondent engaged in an obvious violation of Rule 16-109(A) by representing a person (Ruth) in the same or a substantially related matter in which that person's interests were

materially adverse to those of a former client (Bruce) and without the consent of the former client.

[*28] Although the hearing committee did not specifically conclude that Respondent's actions in having Bruce execute a new will and trust in Ruth's favor constituted a violation of the conflict of interest provisions of the Rules, we exercise our independent authority to so conclude. *See Bristol,* 2006 NMSC 41, ¶ 18, 140 N.M. 317, 142 P.3d 905 (recognizing de novo review of hearing committee's conclusions of law). Respondent was disqualified from representing Bruce when he went to the Woodmark. If he was purporting to represent Ruth, as he claimed he was when Judge Vanzi was considering whether to revoke the new will and trust, then this is another obvious instance where Respondent was in violation of Rule 16-109(A).

C. Misrepresentation and Misleading the Court

[*29] Respondent also argues there was not substantial evidence to prove that he engaged in misrepresentations during the course of his attempts to represent Bruce and Ruth in the various state and federal court proceedings. Rule 16-804(C) states, "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The hearing committee found that due to Respondent's actions in the Moody Bible lawsuit, the Citigroup lawsuit, and the Woodmark visit, Respondent violated Rule 16-804(C) by engaging in conduct

involving misrepresentation. There is ample proof for this conclusion.

[*30] The history of this case begins with a guardianship and conservatorship proceeding before Judge Vanzi. NMSA 1978, Section 45-5-402 (1975) grants exclusive jurisdiction to the court in which a petition for guardianship or conservatorship is filed "to determine how the estate of the protected person which is subject to the laws of New Mexico shall be managed, expended or distributed to or for the use of the protected person or any of his dependents." Aware of the guardianship proceeding and the appointment of a temporary guardian for Bruce, Respondent filed two lawsuits in federal court, in effect seeking to remove those assets from the jurisdiction of the state district court. He did so without notifying Judge Vanzi, Richard Reidy, Bruce's guardian *ad litem,* or the petitioner in the guardianship and conservatorship proceeding.

[*31] In addition, Respondent never notified the federal courts of the pending guardianship and conservatorship proceeding. Indeed, when Judge Vanzi appointed Decades LLC as Bruce's temporary guardian and conservator, Respondent never notified the federal courts of such appointment. In fact, when Respondent was disqualified from representing Bruce, and later Ruth, he never notified the federal courts. When Judge Vanzi revoked Ruth's power of attorney, Respondent never notified Citigroup, with whom he negotiated a settlement in the case, that the power of

attorney he relied on to negotiate the settlement had been revoked.

[*32] The hearing committee also concluded that Respondent engaged in conduct constituting misrepresentation when he visited the Woodmark. The testimony by deputy disciplinary counsel's witnesses is not contradicted by Respondent's testimony or by that of his witnesses. After having been disqualified from representing Bruce, after Decades LLC had been appointed Bruce's temporary guardian and conservator, and notwithstanding his own recognition of Bruce's incapacity, Respondent nevertheless induced Bruce to execute a new will and trust. The new will and trust would have removed all of Bruce's assets from the jurisdiction of the state court and would have made Ruth trustee with all the power "that an absolute owner of such property would have." Respondent managed to have Bruce sign new legal documents without notifying Richard Reidy, the guardian *ad litem,* or Decades LLC, the temporary guardian and conservator. Nor did Respondent obtain leave of the court to visit Bruce. Taken together, all of these actions support the hearing committee's conclusion that Respondent's conduct associated with the Woodmark visit amounted to misrepresentation in violation of Rule 16-804(C).

[*33] Additionally, by reason of Respondent's conduct in the Moody Bible lawsuit, we find that Respondent violated Rule 16-102(D), which states, "A lawyer shall not engage, or counsel a client to engage, or assist a client, in conduct that the lawyer knows is

criminal or fraudulent or which misleads the court. . . ." Respondent did not notify the federal court handling the Moody Bible lawsuit when he was disqualified from representing Bruce or when he was subsequently disqualified from representing Ruth. By continuing with the Moody Bible lawsuit, Respondent assisted Ruth in engaging in conduct he knew to be misleading to the federal court. His motion to vacate an initial scheduling order on behalf of Bruce and Ruth is evidence of his continuing actions taken to mislead the federal court.

[*34] Throughout these proceedings, Respondent has suggested he did not misrepresent his authority to represent Bruce or Ruth because he never expressly discussed the actions the state and federal courts had taken to disqualify him. For example, the hearing committee asked Respondent questions regarding the power of attorney that Respondent had sent to the attorney for Smith Barney in settlement of the Citigroup suit. This power of attorney was revoked by Judge Vanzi and Respondent never notified either Smith Barney or Citigroup that the power of attorney had been revoked. When asked about the circumstances surrounding this situation, Respondent said, "I didn't mislead him in saying that the power of attorney is in current force and effect." Respondent also said, "He didn't ask me if it was still in full force and effect. If you don't ask the right question, I won't give you the right answer." Statements like this reveal Respondent's disturbingly skewed perception of what it means to be truthful.

[*35] "Lawyers are officers of the court and are always under an obligation to be truthful to the court." *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 339, 695 P.2d 483, 489 (1985). "'Candor and honesty are a lawyer's stock and trade. Truth is not a matter of convenience. Sometimes lawyers may find it inconvenient, embarrassing, or even painful to tell the truth.'" *In re Mikus*, 2006 NMSC 12, ¶ 9, 139 N.M. 266, 131 P.3d 653 (per curiam) (quoting *In re Scavone*, 106 N.J. 542, 524 A.2d 813, 820 (N.J. 1987)). As we have previously recognized, misrepresentation can be by either commission or omission. *Id.*

[*36] Respondent had a duty to inform the court and interested parties in the guardianship and conservatorship proceeding of the filing of the federal lawsuits, but he did not. Respondent also had a duty to inform those parties of his visit to the Woodmark, a visit he should not have made in the first place, but he did not. Respondent had a duty to disclose to the federal court in the Moody Bible lawsuit what had transpired regarding the guardianship and conservatorship proceeding, particularly his disqualification, but he did not. Respondent had a duty to inform Citigroup and the federal court handling the case that the power of attorney had been revoked, but he did not. In short, Respondent did a serious disservice to his clients and the courts by withholding such necessary information. We accordingly conclude that Respondent's silence and continued course of conduct within the various proceedings under these circumstances rises to the level of misrepresentation.

[*37] Based upon the aggregate of Respondent's conduct, the hearing committee also concluded that Respondent engaged in conduct that was prejudicial to the administration of justice, violating Rule 16-804(D), and engaged in conduct adversely reflecting on his fitness to practice law, violating Rule 16-804(H). This Court has concluded that similar conduct violates Rule 16-804(D) and (H) in other disciplinary cases. *See, e.g., In re Archuleta,* 1996 NMSC 39, 122 N.M. 52, 54-55, 920 P.2d 517, 519-20 (1996) (per curiam) (recognizing that attorney's intentional failure to report to the bankruptcy court fees he received amounted to violation of rules of professional conduct prohibiting conduct prejudicial to the administration of justice); *In re C'de Baca,* 109 N.M. 151, 152, 782 P.2d 1348, 1349 (1989) (per curiam) (noting that use of knowledge of former client's assets to request loans for ventures in gold ore processing and a private pay-phone company and conduct involving dishonesty or misrepresentation in dealings with client was conduct prejudicial to the administration of justice and conduct adversely reflecting on fitness to practice law).

[*38] We therefore uphold the hearing committee's conclusions that the aggregate of Respondent's conduct was prejudicial to the administration of justice and reflected adversely on Respondent's fitness to practice law in violation of Rule 16-804(D) and (H).

D. Communication with Person Represented by Counsel

[*39] In addition, we hold that Respondent's actions in relation to the Woodmark visit constitute a violation of Rule 16-402, which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Respondent's actions in going to the Woodmark, speaking with Bruce about executing a new will and trust, and, in fact, getting him to execute the new will and trust without notifying Bruce's guardian and conservator, is inexcusable. Whether Respondent purported to represent Bruce or Ruth at this time is of no consequence. The subject matter of the visit was Bruce's finances, and when executing a new will and trust, the legal representatives appointed by the court or hired by Decades LLC should have been present. Respondent did not obtain consent from Decades LLC to take these actions and he had no alternate legal authorization to do so. Accordingly, we agree with the hearing committee's conclusion that Respondent's conduct in this regard also violated Rule 16-402.

E. Respondent's Procedural Challenges

[*40] Respondent has argued throughout these proceedings that the disciplinary board disregarded

the New Mexico Rules Governing Discipline, engaged in prosecutorial misconduct, and violated his due process rights. Respondent argues that those purported procedural violations warrant a dismissal of the charges against him. The Court concludes that Respondent's arguments have no merit and that he has failed to show any prejudice as a result of these alleged procedural violations.

[*41] First, Respondent alleges that the board did not follow Rule 17-307(C) NMRA, which requires that the Respondent be advised of the "general nature of the allegations" and be given "a fair opportunity to present any matter of fact or mitigation the respondent-attorney wants disciplinary counsel to consider." Deputy disciplinary counsel sent Respondent a copy of the complaint filed by Judge Vanzi and requested a response.

[*42] Respondent's interpretation of Rule 17-307(C) would require that deputy disciplinary counsel "articulate all acts considered to be violations of every Rule of Professional Conduct for which they intend to incorporate in a formal specification of charges. . . ." However, the Rule states that "the respondent-attorney shall always be advised of the *general* nature of the allegations." Rule 17-307(C) (emphasis added). Judge Vanzi's letter gave detailed information regarding the general nature of the allegations so as to put Respondent on notice as to the charges against him. Rule 17-307(C) does not require more.

[*43] Respondent alleges that deputy disciplinary counsel did not write a summary report or include any opposing positions as required by Rule 17-307(D) before referring the case to a reviewing officer. Respondent also argues that by this violation, deputy disciplinary counsel violated his confidentiality rights under Rule 17-304 NMRA. Additionally, Respondent argues that because there was never an intention by deputy disciplinary counsel to resolve the matter with a dismissal or informal admonition under Rule 17-104(B) NMRA, it was a violation of Rule 17-307(D) for deputy disciplinary counsel to seek review by a reviewing officer. However, deputy disciplinary counsel explains that the case was referred to Norman S. Thayer because of his expertise in the area, and he was requested to give an advisory opinion on conflict of interest questions. As such, deputy disciplinary counsel did not use Mr. Thayer as a reviewing officer for the purpose of approving or disapproving dismissals of complaints for formal investigation and offers of informal admonitions, making Rule 17-104(B) inapplicable.

[*44] Moreover, pursuant to Rule 17-307(A), deputy disciplinary counsel was authorized, as part of the initial investigation, to refer this matter "to an appropriate assistant counsel or commissioned investigator for report and recommendations." Mr. Thayer is, therefore, more properly viewed as a "commissioned investigator" or "assistant counsel" under Rule 17-307(A). Thus, the referral did not violate Respondent's confidentiality rights because this is an action

deputy disciplinary counsel is authorized to take pursuant to Rule 17-307. Moreover, the referral to a commissioned investigator or assistant counsel was of potential benefit to Respondent because deputy disciplinary counsel was, in essence, getting a second opinion as to whether certain matters were appropriate to pursue. Given that the referral was authorized by the rules and could have benefitted Respondent, we perceive no procedural violation or prejudice as a result of deputy disciplinary counsel's decision to refer the case for advice as a part of his investigation of the matter. *See In re Castellano,* 119 N.M. 140, 144, 889 P.2d 175, 179 (1995) (per curiam) (holding that an assertion of prejudice is not a showing of prejudice).

[*45] Next, Respondent argues that the disciplinary board failed to follow Rule 17-307(E), requiring that chief disciplinary counsel approve charges prior to filing. Although deputy disciplinary counsel acknowledges that there was no written documentation of approval, there was evidence that chief disciplinary counsel did, in fact, approve the charges. Also, as deputy disciplinary counsel correctly points out, there is no requirement in Rule 17-307(E) that the approval be in writing. *See* Rule 17-307(E) (stating that deputy disciplinary counsel shall present a draft of the proposed specification of charges to chief disciplinary counsel prior to filing, and chief disciplinary counsel shall approve the filing of the charges or recommend an alternate course of action). We therefore find no error on this point.

[*46] Next, Respondent argues that fraud was not pleaded with particularity in the specification of charges as required by Rule 1-009(B) NMRA, which states, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Respondent's argument is that this rule applies to pleadings in disciplinary cases and that it was not followed. *See* Rule 17-301(B) NMRA (stating that the Rules of Civil Procedure for the District Courts of New Mexico apply to disciplinary proceedings, except where clearly inapplicable). Without deciding whether Rule 1-009(B) applies to disciplinary cases in New Mexico involving allegations of fraud or misrepresentation, we simply note that deputy disciplinary counsel met the standard in this case by particularizing the instances of misrepresentation sufficiently in the specification of charges so as to leave no doubt in Respondent's mind as to the charges asserted against him. *See Steadman v. Turner,* 84 N.M. 738, 740, 507 P.2d 799, 801 (Ct. App. 1973) (noting that in pleading a claim of fraud, the evidentiary details of the claim need not be alleged); *Romero v. Sanchez,* 83 N.M. 358, 359, 492 P.2d 140, 141 (1971) (concluding that in the aggregate, the allegations alleged with sufficient particularity a fraudulent plan, scheme, or design). *See Delgado v. Costello,* 91 N.M. 732, 734, 580 P.2d 500, 502 (Ct. App. 1978) (recognizing that even if the word fraud is not used in the pleadings, the allegations should leave no doubt in the defendants' minds as to the fraud claims asserted against them). In conclusion, the specification of charges filed by deputy disciplinary counsel met the

pleading requirements of Rule 1-009(B), because the particular factual allegations were alleged in detail and the rules were stated with specificity so as to leave no doubt as to the charges against Respondent.

[*47] Respondent also argues that the disciplinary board engaged in prosecutorial misconduct during these proceedings. First, Respondent argues that the failure of chief disciplinary counsel to review any proposed formal specification of charges before filing by deputy disciplinary counsel constitutes prosecutorial misconduct. As addressed above, chief disciplinary counsel did ultimately approve the charges and there is no requirement that the approval be in writing.

[*48] Secondly, he argues that deputy disciplinary counsel gave false statements in two instances. The first instance involves the sequestered file in the guardianship and conservatorship proceeding before Judge Vanzi, and whether the materials from the file could be used in Respondent's disciplinary proceeding. Respondent filed a motion in limine stating that materials from a sequestered file could not be used outside the proceeding. Deputy disciplinary counsel stated to the hearing committee that Judge Vanzi's complaint letter was accompanied with materials from the sequestered case, and therefore it could be used in the disciplinary case. The hearing committee denied Respondent's motion.

[*49] However, Respondent found a letter to deputy disciplinary counsel from Judge Vanzi specifically informing deputy disciplinary counsel that he could not use the materials from the sequestered file and that they had to be kept confidential. Armed with this letter, Respondent filed a motion for rehearing, and the hearing committee reversed its ruling, stating that no documents from the sequestered file would be "entered into evidence unless and until there's an order from Judge Vanzi releasing specific documents and setting forth the conditions under which they may be admitted in this proceeding and to be used in this proceeding." Respondent argues that deputy disciplinary counsel's statements were intentional misrepresentations to the hearing committee and constitute prosecutorial misconduct.

[*50] The hearing committee admonished deputy disciplinary counsel for not disclosing the letter. Deputy disciplinary counsel stated to the hearing committee, "There's no question I received the letter. It was just not something that was on my radar screen at the time, and that's all I can say about the letter." Deputy disciplinary counsel said further, "there was no intent on my part to mislead the hearing committee." Respondent asked that the hearing committee dismiss his case for prosecutorial misconduct and the committee denied this motion. In denying Respondent's motion, the chair of the hearing committee stated:

> Mr. Stein, I have made my displeasure with the way Mr. Widman handled and addressed the confidentiality issue very clear already in this case. I don't think it was handled properly. I think it could have been handled much more professionally and expeditiously, but it was not. Nonetheless, I do not believe that there is any ground to dismiss for prosecutorial misconduct.

The other committee members concurred.

[*51] A deferential standard of review is used by this Court to review the hearing committee's findings of fact. *See In re Bristol,* 2006 NMSC 41, ¶ 15-17, 142 P.3d 905. As this Court stated:

> [T]he hearing committee is the only entity designated to take evidence during the course of a formal disciplinary proceeding. *See* Rule 17-314(C); *see also* Rule 17-313. Because the hearing committee directly observes witness testimony, it is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence.

Id. ¶ 15. As such, the evidence must be viewed in the light most favorable to the hearing committee's implicit decision that deputy disciplinary counsel did not intentionally mislead the committee regarding confidentiality of the documents from Judge Vanzi.

[*52] Respondent's third alleged instance of prosecutorial misconduct deals with another disputed

issue in these proceedings: whether deputy disciplinary counsel misrepresented his intent not to rely on collateral estoppel during the course of the disciplinary proceedings below. Respondent argued below that the orders entered by the state and federal judges in the Clinesmith matters could not be used as proof in this disciplinary case because he did not have a chance to fully litigate the validity of the orders. Respondent's argument is premised on the principle that a party against whom collateral estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior actions. *See Deflon v. Sawyers,* 2006 NMSC 25, ¶ 14, 139 N.M. 637, 137 P.3d 577.

[*53] Deputy disciplinary counsel responded below that collateral estoppel was not being used against Respondent. Instead, deputy disciplinary counsel argued that Respondent was barred from collaterally attacking the orders he was charged with violating. Deputy disciplinary counsel pointed out that Respondent has continually attempted to collaterally attack Judge Vanzi's orders by showing that he did not have a fair hearing on the issues that were the subject of the orders. As deputy disciplinary counsel stated in his brief to the hearing panel, "[a] party who disobeys an order may not collaterally attack the validity of the underlying order in the course of an appeal from a judgment holding the party in criminal contempt of court for violating the order." *In re Philip Kleinsmith,* 2005 NMCA 36, ¶ 11,

138 N.M. 601, 124 P.3d 579 (citing *State v. Cherryhomes,* 114 N.M. 495, 498, 840 P.2d 1261, 1264 (Ct. App. 1992)). Deputy disciplinary counsel also pointed out to the hearing committee that Respondent could have appealed his disqualification by Judge Vanzi, but he did not do so. *See Weeks v. Indep. Sch. Dist.,* 230 F.3d 1201, 1207 (10th Cir. 2000) ("Counsel have standing to appeal orders that directly aggrieve them."); *see also Cherryhomes,* 114 N.M. at 498, 840 P.2d at 1264 (holding that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings" and the "[w]illful violation of a court's order . . . cannot be tolerated" (internal quotation marks and citations omitted)). Although the hearing committee did not make a specific finding as to deputy disciplinary counsel's conduct on this issue, we conclude that deputy disciplinary counsel was simply making a valid legal argument regarding the effect of the district court orders and was not breaching some purported commitment not to use collateral estoppel against Respondent.

[*54] In addition to rejecting the factual bases for Respondent's claim of prosecutorial misconduct, we also question Respondent's reliance on the concept of prosecutorial misconduct within the context of a disciplinary proceeding. Relying on the three instances of what Respondent characterizes as prosecutorial misconduct described above, Respondent cites

to *State v. Breit,* 1996 NMSC 67, ¶ 37, 122 N.M. 655, 930 P.2d 792, for support. In *Breit,* this Court adopted a standard of willful disregard for determining when retrial is barred because of prosecutorial misconduct. *Id.* ¶ 32. The prosecutor's conduct in *Breit* was described as "pervasive, incessant, and outrageous," which is how Respondent characterizes deputy disciplinary counsel's actions. *Id.* ¶ 37.

[*55] The alleged actions of deputy disciplinary counsel in no way compare to the actions of the prosecutor in *Breit.* By contrast, Respondent only points to three instances of purported misconduct. As discussed above, viewing the evidence in the light most favorable to the hearing committee's findings regarding the issue of prosecutorial misconduct, there is no indication that deputy disciplinary counsel proceeded in bad faith or engaged in the level of misconduct contemplated by *Breit,* assuming of course, that *Breit* even applies in this context.

[*56] Finally, Respondent argues continually throughout these proceedings that he was denied discovery and that the specification of charges should have been dismissed for failure to put him on notice of his actual actions that corresponded to the claimed violations of the Rules of Professional Conduct. We have already rejected Respondent's challenges to the adequacy of the specification of charges for the reasons discussed earlier in this opinion. In addition, we conclude that no facts were found or conclusions drawn that were not alleged in the specification of charges. We also previously rejected Respondent's

claims of inadequate discovery when we denied Respondent's petition for extraordinary writ and emergency request for stay filed with this Court earlier in these proceedings.

[*57] The record reflects that Respondent received the entire disciplinary board file prior to the hearing. All of the exhibits were available to him, there was nothing he had not seen before, and there was no allegation by Respondent that he was, in fact, specifically prejudiced by any lack of discovery. *See Castellano,* 119 N.M. at 144, 889 P.2d at 179 (holding that an assertion of prejudice is not a showing of prejudice).

[*58] Respondent has repeatedly attempted to assert prejudice in terms of his surprise at the hearing committee's conclusions of law and not as to the evidence relied on by the hearing committee. In fact, the hearing panel brought this to Respondent's attention, stating that "discovery is for facts, not for law." To ensure that Respondent was not prejudiced by any purported lack of discovery, the hearing panel finally asked Respondent to go through each of the findings of the hearing committee and "identify specifically the ones that are not supported or that you are prejudiced because there wasn't discovery, and somehow you would have proved something different." In response, Respondent discussed his objections to some of the findings, but did not point to specific instances where a lack of discovery prejudiced his ability to challenge the evidence in support of these findings. After this thorough questioning, the hearing

panel concluded that "[t]he hearing committee did not abuse its discretion in denying Respondent discovery. Respondent was not prejudiced or surprised by the evidence presented by Deputy Disciplinary Counsel and Respondent was given a full opportunity to answer all charges."

[*59] We find no basis for overturning the panel's decision in this regard. In fact, Respondent was asked before this Court, "Was there anything at the hearing that surprised you, in terms of not knowing of its existence before?" Respondent replied, "I don't think so, but I didn't know what the impact was." While Respondent may have been in denial about the gravity of his actions, we have no doubt that Respondent was not surprised by evidence submitted in the hearings below, and that he was in no way prejudiced by any purported lack of discovery.

F. Appropriate Discipline

[*60] Although the hearing panel adopted the hearing committee's findings and conclusions with regard to Respondent's conduct and violation of the Rules of Professional Conduct, the hearing panel disagreed with the hearing committee's recommendation to discipline Respondent with a suspension. Instead, the hearing panel recommended to this Court that Respondent be disbarred. The disagreement between the hearing committee and the hearing panel notwithstanding, this Court independently determines the appropriate level of discipline. *See*

Bristol, 2006 NMSC 41, ¶¶ 18, 30. In this regard, this Court looks to the *ABA Standards for Imposing Lawyer Sanctions* (1992) for guidance in determining appropriate lawyer disciplinary sanctions. *In re Key,* 2005 NMSC 14, ¶ 5, 137 N.M. 517, 113 P.3d 340.

1. Intentional Conduct

[*61] Within the framework of the *ABA Standards,* disbarment is generally deemed appropriate for intentional misconduct, suspension for knowing misconduct, and reprimand for negligent misconduct. As deputy disciplinary counsel pointed out to the hearing panel, this Court has repeatedly noted that a pattern of intentional conduct warrants disbarment. *See, e.g., In re Arrieta,* 105 N.M. 418, 420, 733 P.2d 866, 868 (1987) (per curiam); *In re C'de Baca* 109 N.M. at 153, 782 P.2d at 1350. Furthermore, "[w]hen an attorney is found to have engaged in acts of intentional dishonesty, there is a presumption that he or she is unfit for membership in the bar of this state." *In re Romero,* 2001 NMSC 8, ¶ 10, 130 N.M. 190, 22 P.3d 215 (per curiam) (internal quotation marks and citation omitted).

[*62] There is ample evidence to prove that Respondent knowingly and intentionally violated the Rules of Professional Conduct. Respondent knowingly failed to avoid a conflict of interest by purporting to represent Bruce and Ruth in the guardianship and conservatorship proceeding, yet at the same time

filing two lawsuits seeking to drastically alter Bruce's estate in favor of Ruth, while acknowledging Bruce's potential incapacity. *See* Section 4.31 (stating that a lawyer's intentional simultaneous representation of clients with adverse interests and a lawyer's intentional representation of a client with materially adverse interests to those of another client or former client in a substantially related matter can be cause for disbarment). Further, Respondent intentionally continued to represent Bruce and Ruth after he was disqualified from doing so, which constitutes misrepresentation to the court. *See* Section 6.11 (stating that a lawyer's intentional falsification, deceit, or withholding of material information can be cause for disbarment). In addition, while the guardianship and conservatorship case was pending, Respondent engaged in misrepresentation and intentional deceit to the court by filing the two federal suits without notifying the court or other interested parties, and having Bruce change his will and trust after being ordered to discontinue his representation of Bruce. *Id.*; *see also* Section 5.11 (stating that "disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice").

[*63] Respondent argued before the hearing committee that Judge Vanzi's order was not clear, that it contained no prohibition on Respondent changing Bruce's testamentary documents, and that he did nothing wrong. His claims to the contrary notwithstanding,

Respondent intentionally violated the plain terms of Judge Vanzi's order, which reads:

> The interests of Bruce C. Clinesmith and Ruth M. Clinesmith are adverse to each other in this proceeding and in the federal proceedings currently pending. Representing both individuals in these proceedings constitutes an impermissible conflict of interest and neither Stuart L. Stein, Esq. or The Stein Law Firm can continue to represent the interests of Bruce C. Clinesmith.

See Section 6.21 (stating that "disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding").

[*64] As noted above, ignoring a judge's order, whether one agrees or disagrees with it, is impermissible. There are avenues for appealing judges' orders and Respondent did not avail himself of those options. *See Weeks,* 230 F.3d at 1207 ("Counsel have standing to appeal orders that directly aggrieve them."); *Cherryhomes,* 114 N.M. at 498, 840 P.2d at 1264 (holding that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings" and the "willful violation of a court's order . . . cannot be tolerated") (internal quotation marks and citations omitted). Respondent cannot

now attack the validity of Judge Vanzi's orders simply because his unethical conduct is now cause for his disbarment.

2. Aggravation and Mitigation

[*65] In considering the appropriate level of discipline, this Court may consider aggravating and mitigating factors to either increase or reduce the degree of discipline imposed. *See ABA Standards,* Sections 9.1 to 9.3. In formulating its recommendations, the hearing committee considered several factors in aggravation, including Respondent's history of prior disciplinary offenses, his commission of multiple offenses, his refusal to acknowledge the wrongful nature of his conduct, and his substantial experience in the practice of law.

[*66] In reviewing the hearing committee's disciplinary recommendations, the hearing panel found further aggravating factors of dishonest or selfish motive and vulnerability of the victim. The panel concluded that no mitigating factors existed. The hearing panel ultimately concluded that Respondent should be disbarred from the practice of law for not less than five years and that a motion for permission to apply for reinstatement not be filed for a period of at least five years from the effective date of the disbarment pursuant to Rule 17-214 NMRA. *See In re Bristol,* 2006 NMSC 41, ¶ 3, 142 P.3d 905 (stating that the hearing panel may accept, reject, modify

or increase the sanctions contained in the recommendations of the hearing committee). We agree with the hearing panel's assessment that disbarment is the appropriate level of discipline in this case.

[*67] Throughout these proceedings, and before this Court, Respondent has maintained he did nothing wrong. Respondent's attitude during these proceedings and answers to questions asked regarding issues in the case give cause for alarm.

[*68] For example, when asked by the hearing panel about Judge Vanzi's order previously cited in this opinion, and what the words "this proceeding" meant, the panel asked if that means "this proceeding dealing with [Bruce Clinesmith's] estate." Respondent said, "[n]o, I don't know what it means." Respondent then answered that "[t]he proceeding was a guardianship and conservatorship proceeding." The panel then asked, "Isn't that concerned with the assets in the estate of the person?" to which Respondent replied, "[s]ure it is. But I didn't do anything." This is just one of many examples where Respondent refuses to accept the order as it is, puts unreasonable interpretations on it, and then insists that he has done nothing wrong.

[*69] Another example of Respondent's state of denial concerns his visit to the Woodmark to have Bruce execute a new will and trust. When Respondent was before Judge Vanzi, Respondent did not dispute that he did not notify Bruce's guardian *ad litem,* or his temporary guardian and conservator, of

his visit to the Woodmark. When asked by Judge Vanzi why he did this, Respondent replied, "[i]n this case this is what I did and I feel that it is fine. It is ethical and not in contravention of your order." In light of what Respondent knew and what he intentionally did, it is, to say the least, troubling that he has steadfastly maintained that he has acted ethically.

[*70] As further evidence of Respondent's denial and refusal to account for his actions, Respondent filed a motion for rehearing with this Court following the announcement of his disbarment. Respondent again makes the same arguments he has continually made throughout these proceedings and raises no new issues. In particular, Respondent claims that Bruce's incapacity was not at issue during the proceedings. However, Respondent acknowledged in the federal suits he filed and in his statements to Judge Vanzi that Bruce's capacity was in question. Similarly, Respondent claims he did not know that his failure to abide by court orders would be used as grounds for discipline. As is obvious from what is set forth above, there is no doubt that Respondent had knowledge of the charges against him regarding his conduct related to the court orders and that such conduct could result in disciplinary action.

[*71] "It is the obligation of the organized bar and the individual lawyer to give unstinted cooperation and assistance to the Supreme Court, and its agency the disciplinary board, in discharging its function and duty with respect to discipline and in

purging the profession of the unworthy." Preface, *Rules Governing Discipline,* 17-101 to -316. Contrary to this obligation, throughout these proceedings Respondent has expressed disdain and contempt for the disciplinary board. He has expressed publicly, through the use of his web site, his displeasure with disciplinary board members. Much like the situation before us in *In re Quintana,* 104 N.M. 511, 513-14, 724 P.2d 220, 222-23 (1986):

> Rather than recognizing his own shortcomings, he continues to blame others for his acts and omissions. In addition, he has openly chastised disciplinary counsel and this Court for what he evidently perceives as unjustified "punishment." Our obligation is to protect the public and the reputation of the profession, and safeguard the administration of justice. [Respondent's] sustained inability to grasp any appreciation of how his conduct falls below the standards set for attorneys or any understanding of his professional obligations convinces us that an extension of the previously imposed sanction is required for the protection of the public.

[*72] Were this Respondent's first time before this Court, we might be less inclined to impose the ultimate sanction of disbarment. However, Respondent has other disciplinary offenses. Notably, Respondent received a formal reprimand a mere two years ago for conduct similar to his conduct here. In that case, Respondent created a trust for a client that involved a change to an estate plan, making his son

and daughter co-successor trustees. Respondent then represented the adverse interests of the son, while he was still representing the father. As stated in the formal reprimand, "You put yourself in a untenable ethical position by attempting to represent the competing interests of [father] and [son]. This is precisely the type of conduct that the conflict of interest rules are intended to prevent." Several factors in aggravation were found in that proceeding, including history of prior disciplinary offenses, selfish motive, committing multiple offenses, engaging in deceptive practices in responding to the disciplinary process, and substantial experience in the practice of law. This Court has noted that repeated instances of the same conduct for which a lawyer previously has been disciplined generally will result in more severe discipline. *In re Houston,* 1999 NMSC 32, ¶ 19, 127 N.M. 582, 985 P.2d 752.

III. CONCLUSION

[*73] In light of the evidence of repeated intentional misconduct by Respondent, we accept the hearing panel's recommendation for disbarment. Respondent is therefore disbarred from the practice of law pursuant to Rule 17-206(A)(1) NMRA. As previously ordered by this Court, Respondent must comply with all requirements of Rules 17-212 and 17-214 NMRA prior to being permitted to apply for reinstatement. Moreover, as previously ordered by the Court, Respondent shall pay the costs in this matter on or before March 19, 2008; any balance remaining

thereafter shall accrue interest at the rate of 8-3/4% per annum; and such costs shall be reduced to a transcript of judgment.

[*74] Finally, Respondent's motion for rehearing is denied.

[*75] **IT IS SO ORDERED.**

EDWARD L. CHAVEZ, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

EXHIBIT M

IN THE SUPREME COURT
STATE OF NEW MEXICO

Case No: _____

STUART L. STEIN, ESQ.,
an attorney admitted to
the State Bar of New Mexico,

Petitioner,

vs.

ROBERT P. TINNIN, JR., ESQ.,
Hearing Committee Chair,
JOHN P. EASHAM, ESQ.,
Hearing Committee Member and
MS. CAROLYN TINKER,
Hearing Committee Member,

Respondents.
_____/

PETITION FOR EXTRAORDINARY WRIT AND EMERGENCY REQUEST FOR STAY

THE STEIN LAW FIRM
Attorney for Petitioner/Appellant
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

REQUIREMENTS UNDER RULE 12-504(B)

(a) The Supreme Court has jurisdiction over the subject matter of this Petition since the issues arise

from actions of a Hearing Committee appointed pursuant to Rule 17-312(A) of the Rules Governing Discipline by the Chair of the Disciplinary Board, an agency of the Supreme Court of New Mexico.

(b) That this court has original jurisdiction over attorney discipline by the promulgation of rules. N.M.S.A. 1978 § 36-2-1. The Court has established the Rules Governing Discipline. N.M.R.A. 17-301, *et seq.* This action might properly come before a United States District Court for the District of New Mexico for the actions of the Respondents are in violation of the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution.

(c) The real parties in interest acting in the discharge of their legal duties are the Respondents, who compose the Hearing Committee, the members of the Disciplinary Board and Disciplinary Counsel in that office's position as the legal counsel to the Disciplinary Board and in its role as prosecutor of the Specification of Charges it filed before the Hearing Committee, below.

(d) The grounds upon which this Petition is based with the facts and law supporting the Petition are outlined as follows:

INTRODUCTION – STATEMENT OF THE CASE AND FACTS

Petitioner, Stuart L. Stein, Esq., hereinafter Petitioner Stein, is an attorney duly licensed to

practice law in the State of New Mexico and is a member in good standing of the State Bar of New Mexico. Petitioner Stein requests an Extraordinary Writ to issue to Respondents who constitute the hearing committee before which Petitioner Stein is facing a Specification of Charges, from an adverse ruling contained in an Order dated July 14, 2006 which denied any discovery what-so-ever in a pending disciplinary action and refused to allow a continuance from a date for the final/formal hearing now set for July 18, 2006. Petitioner also requests an immediate STAY of the proceedings below based on the facts contained herein.

Although there are many pleadings filed in the disciplinary case, below, the relevant letters, pleading and papers are attached as Exhibits to this Petition.

Briefly put, a Specification of Charges, Discipline No. 03-2006-507, was signed by Deputy Disciplinary Counsel Joel L. Widman on March 15, 2006. Exhibit 1. After service of the Specification of Charges, a Motion for Enlargement of Time to file responsive pleadings was served on April 20, 2006. Exhibit 2. Thereafter, an Alternative Motion to Dismiss Specification of Charges was served by Petitioner on April 29, 2006. Exhibit 3.

Discipline Counsel served a Motion to Set Provisional Hearing Date on June 14, 2006. Exhibit 4. Prior to the 15 days allowed for a Response under N.M.R.A. 1-007.1.D, a Notice of Hearing on Merits was issued by Respondent Chair on May 23, 2006.

Exhibit 5. (An Amended Notice of Hearing was issued on May 30, 2006 setting the date for July 18, 2006. Exhibit 6.) The 15 days in which a Response could have been filed raising objection to the setting of a hearing on the merits prior to the service of an Answer would include May 31, 2006. This date is without allowing time for mailing. See, Rule 1-006. On May 22, 2006, upon noting that Disciplinary Counsel did not respond to the Motion to Dismiss (Exhibit 3) for 21 days, Petitioner herein filed a Motion for Granting the April 29, 2006 Motion to Dismiss. Exhibit 7.

Discipline Counsel finally responded to the Motion to Dismiss on June 6, 2006. Exhibit 8. On June 20, 2006 the Reply of Petitioner was served. Exhibit 9. On June 22, 2006 the Order of the hearing committee denying the pending motion to dismiss was issued. Exhibit 10. The Answer and Counterclaim was served on July 3, 2006. Exhibit 11. On July 3, 2006 – the same date as service of the Answer and Counterclaim – a Motion to Continue and Re-Set Final/Formal Hearing was served by Petitioner. Exhibit 12. Likewise, a Request for Discovery was served on July 3, 2006. Exhibit 13. (It should also be noted that Petitioner Stein attempted to get materials in the investigative stage but was denied any access to such materials out of hand. See, Exhibit 14 and 15.)

In an Order entered on July 14, 2006 – without any response from Discipline Counsel – Respondents, who constitute the hearing committee on this matter

– denied any discovery what-so-ever as requested by Petitioner Stein. Exhibit 16. Then, since the motion to continue was based on the need to conduct discovery and all discovery was foreclosed, no continuance was granted. *Id.*

LEGAL ARGUMENT

Concerning Due Process in administrative hearings, this Court has held as follows:

> Due process requires that the proceedings looking toward a deprivation be essentially fair. The essential guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property. A fair trial in a fair tribunal is a basic requirement of due process.

Board of Education of Carlsbad Municipal Schools v. Harrell, 118 N.M. 470, 478, 882 P.2d 511, 519 (1994) (citations and quotes omitted.) Since this Court has determined in its collective wisdom to include a specific Rule Governing Discipline that grants attorneys accused of disciplinary violations to have discovery under Rule 17-311, a complete denial of any discovery what-so-ever is a clear federal and state Due Process violation. It is impossible to defend a complete lack of discovery in a proceeding that has the potential of depriving a lawyer of his right to practice his profession by seeking disbarment.

Further, a fair review of the Exhibits to this Petition reflect a poorly organized and worded Specification of Charges, a refusal of disciplinary counsel to supply non-privileged materials in his file and his response that Petitioner Stein use Rule 17-311 if charges are filed to get discovery, the actions of Respondent hearing committee in denying all discovery and refusing to continue the hearing acts as a clear and absolute abuse of discretion and a denial of fundamental Due Process.

Due Process is a fundamental constitutional right. When such rights are implicated, the review is *de novo*. *State v. Brown*, 2006-NMSC-023 ¶ 8, 139 N.M. 466, 134 P.3d 753, 756. Orders on discovery matters are generally reviewed for an abuse of discretion. *Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 6, ___ N.M. ___, ___ P.3d ___ (June 8, 2006).

Without the issuance of the requested Writ and granting both discovery and a continuance, Petitioner Stein will have no choice but to consistently object to all evidence on July 18, 2006 and, if and when this case gets to this Court under Rule 17-316, the complete absence of discovery would undermine any result. Without notice of what the witnesses will testify to, what papers will be introduced, what specific Rules of Professional Responsibility were violated by what actions of Petitioner Stein, the entire proceeding before the hearing committee is without any creditability or validity. Further, without discovery it will be impossible to present on appeal what evidence Petitioner Stein would have presented

if adequate discovery would have been provided to prove unfair prejudice and error. See, *Investigation into the 1997 Earnings of U S West Communications Inc.,* 1999-NMSC-016, ¶ 37, 127 N.M. 254, 266, 980 P.2d 37, 49.

(e) Petitioner Stein requests that this Court issue an immediate Stay of the proceedings below and, upon granting a response from the Respondents and/or the real party in interests and a reply from Petitioner Stein and allowing oral argument issues its Order to have Respondents (1) grant the requested discovery and (2) grant the continuance requested allowing a minimum of 90 days for such discovery.

REQUEST FOR STAY

Pursuant to Rule 12-504(D), the Petitioner requests a stay of the hearing now set by Respondents for July 18, 2006. Notice of this request for stay is being given to the Respondents by mail delivery. However, because the subject Order was delivered one business day prior to the set hearing, a stay should be entered instanter to avoid immediate and irreparable injury to Petitioner Stein: to begin a hearing for which his license to practice law is at jeopardy without any discovery allowed under Rule 17-311.

REQUEST FOR RELIEF

The Petitioner prays that this Court take jurisdiction over the matter and, upon final hearing, find that the denial of any discovery under Rule 17-311 prior to trial before a hearing committee is a violation of the Due Process rights of Petitioner Stein under the federal and New Mexico constitution, and order the hearing committee to allow the requested discovery and allow no less than 90 for such purpose.

VERIFICATION

/s/ Stuart L. Stein
Stuart L. Stein

STATE OF NEW MEXICO)
)ss:
BERNALILLO COUNTY)

BEFORE ME this July 15, 2006 personally appeared STUART L. STEIN, who, after being duly sworn, states that he has read the above petition and that the information contained in the petition is true and correct to the best of his knowledge and belief.

/s/ Jessica S. Peña
Notary Public

My Commission Expires:

[SEAL] OFFICIAL SEAL
JESSICA S. PEÑA
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 03-31-2010

CERTIFICATION

I HEREBY CERTIFY that the original and a true copy of the foregoing was mailed to Robert P. Tinnin, Esq., Committee Chair, 500 Marquette N.W., Suite 1300, Albuquerque, NM 87102, John P. Eastham, Esq., 2201 San Pedro, NE, Building 2, Suite 207, Albuquerque, NM 87110, Ms. Carolyn Tinker, 1801 Camino Raso, N.W., Albuquerque, NM 87107, Committee Members, and Joel L. Widman, Esq., Deputy Disciplinary Counsel, Post Office Box 1809, Albuquerque, NM 87103-1809 this July 15, 2006.

THE STEIN LAW FIRM
Attorney for Petitioner
City Place – Suite 2200
2155 Louisiana Blvd., N.E.
Albuquerque, NM 87110
Telephone: 505-889-0100

by: /s/ Stuart L. Stein
Stuart L. Stein

EXHIBIT N

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
OF THE STATE OF NEW MEXICO

In Re:

STUART L. STEIN, ESQ. Disciplinary No. 02-2006-505

An Attorney Licensed
to Practice before the
Courts of the State of New Mexico,

Respondent.

HEARING TO CONSIDER MATTERS IN AGGRAVATION AND IN MITIGATION

TRANSCRIPT OF PROCEEDINGS

April 2, 2007

9:08 a.m.

Law Offices of Shapiro, Bettinger and Chase, LLP
7411 Jefferson Street, NE
Albuquerque, New Mexico

COMMITTEE CHAIR: Robert P. Tinnin, Esq.

PANEL MEMBERS: Gregory W. Chase, Esq.
Carolyn Tinker

* * *

[12] have looked through my file, Maybe I should have brought the file down. I would have shown you what happened.

If I'm going to argue from memory now, it's not going to be as good as if I was given adequate notice. I

know I have to be prepared to rebut what he is spinning this case means.

CHAIRMAN TINNEN: Mr. Stein, there are some matters – as we noted already, some matters in aggravation at least were cited in the Specification of Charges. I, frankly, have not read them. I did not read them because of the same reason I wanted to bifurcate this hearing. If we did find some violations, I didn't want in any way to be influenced by allegations in aggravation.

You said you were not permitted discovery. I don't recall you seeking any discovery concerning matters in aggravation.

And we don't need any laughing, please.

MR. STEIN: I didn't get any discovery whatsoever, period. End of story.

CHAIRMAN TINNEN: Did you seek any discovery on matters in aggravation?

MR. STEIN: No. I was concentrating on the charges themselves.

* * *

EXHIBIT O

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
OF THE STATE OF NEW MEXICO

In Re:

STUART L. STEIN, ESQ. Disciplinary No. 02-2006-505

An Attorney Licensed
to Practice before the
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HEARING TO CONSIDER MATTERS IN AGGRAVATION AND IN MITIGATION

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COMMITTEE CHAIR: Robert P. Tinnin, Esq.

PANEL MEMBERS: Gregory W. Chase, Esq.
Carolyn Tinker

* * *

[16] involving Virginia Ferrara that happened 18 years ago.

And there is no glimmer here of any recognition that anything that the Respondent did may even

have been inappropriate. There's just none. Everything that happened is everybody else's fault. There's no responsibility for his own conduct.

And this is evident by his Web site, And this is a printoff of his Web site, dated March 12th, 2007. And this is a matter that the Supreme Court takes very seriously.

And I think the best language is In The Matter of Quintana, 104 NM 511, in which they state, "Rather than recognizing his own shortcomings, he," the respondent, "continues to blame others for his acts and omissions. In addition, he has openly chastised Disciplinary Counsel and this Court for what he evidently perceives is unjustified punishment. Our purpose in disciplining Quintana or other attorneys is not to impose punishment. Our obligation is to protect the public and the reputation of the profession and safeguard the administration of justice. Quintana's sustained inability to grasp any appreciation of how his [17] conduct falls below the standard set for attorneys or any understanding of his professional obligations convinces us that an extension of the previously imposed sanction is required for the protection of the public."

And the previously imposed sanction was indefinite suspicion. And that, I submit to the hearing committee, fits the Respondent, Stuart Stein, to a T in this particular case.

There are two additional factors that I would ask the committee to consider in aggravation. One is the vulnerability of the victim.

And in this case, we contend there are really two victims. One was Bruce Clinesmith, the individual who was the subject of the guardianship proceeding. And the other is Ruth Clinesmith, his wife, who was purported to be represented by the Respondent.

And I think the question, in preparing this, that I asked myself was: Are either of these two individuals better off as a result of Mr. Stein's representation than they were before he started?

And I think the answer to that is no. In fact, I think they're worse off. There were no

* * *

EXHIBIT P

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
OF THE STATE OF NEW MEXICO

In Re:

STUART L. STEIN, ESQ. Disciplinary No. 02-2006-505

An Attorney Licensed
to Practice before the
Courts of the State of New Mexico,

Respondent.

HEARING TO CONSIDER MATTERS IN AGGRAVATION AND IN MITIGATION

TRANSCRIPT OF PROCEEDINGS

April 2, 2007

9:08 a.m.

Law Offices of Shapiro, Bettinger and Chase, LLP
7411 Jefferson Street, NE
Albuquerque, New Mexico

COMMITTEE CHAIR: Robert P. Tinnin, Esq.

PANEL MEMBERS: Gregory W. Chase, Esq.
Carolyn Tinker

* * *

[14] I've made my objection. I await the committee's ruling.

CHAIRMAN TINNEN: Well, I will agree with you on one point. I think that this particular piece of evidence, something 20 years ago on a matter

that is not precisely the same, is at least of not a great deal of relevance. But your objection is overruled, and we'll receive it into evidence.

MR. WIDMAN: Thank you. The next matter in aggravation involves a more recent disciplinary proceeding In The Matter of Stuart L. Stein, Disciplinary No. 06-2003-458, dated November 18, 2005.

And this was a formal reprimand that was published in the Bar Bulletin involving a matter in which Mr. Stein represented a client creating a trust that involved a change to an estate plan, making his son and daughter co-successor trustees and then represented the son in a matter that the committee determined was in conflict with the wishes of the father and then failed to advance the son's objectives, acting in conflict with the wishes of the testator's son.

This more recent matter, we submit, is [15] similar to the conflict issues that arose in this particular case, and we feel that it is a relevant matter for the committee to consider in aggravation.

The next matter that we would ask the,committee to consider in aggravation is a pattern of misconduct, a case by Mr. Stein, this particular case involving multiple offenses. We have multiple violations, according to the findings of the committee, of Rule 16-107(A), 16-107(B), 16-804(c).

And in addition, we have violations, as found by the committee, of three other rules, 16-109(A), 16-109(2), 16-102(D) and 16-401(2).

And perhaps at least from our point of view, the most serious matter in aggravation is the refusal of Mr. Stein to acknowledge the wrongful nature of his conduct.

What he has done, in response to the disciplinary charges in this case, is essentially to lash out at everybody in sight. He has accused the hearing committee of misconduct. He's accused Disciplinary Counsel. He has accused Judge Vanzi of misconduct.

He's brought up a matter involving Virginia Ferrara that is – you know, and he says his matter was 20 years old. He brought up a matter [16] involving Virginia Ferrara that happened 18 years ago.

And there is no glimmer here of any recognition that anything that the Respondent did may even have been inappropriate. There's just none. Everything that happened is everybody else's fault. There's no responsibility for his own conduct.

And this is evident by his Web site. And this is a printoff of his Web site, dated March 12th, 2007. And this is a matter that the Supreme Court takes very seriously.

And I think the best language is In The Matter of Quintana, 104 NM 511, in which they state, "Rather than recognizing his own shortcomings, he," the respondent, "continues to blame others for his acts

and omissions. In addition, he has openly chastised Disciplinary Counsel and this Court for what he evidently perceives is unjustified punishment. Our purpose in disciplining Quintana or other attorneys is not to impose punishment. Our obligation is to protect the public and the reputation of the profession and safeguard the administration of justice. Quintana's sustained inability to grasp any appreciation of how his [17] conduct falls below the standard set for attorneys or any understanding of his professional obligations convinces us that an extension of the previously imposed sanction is required for the protection of the public."

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And in this case, we contend there are really two victims. One was Bruce Clinesmith, the individual who was the subject of the guardianship proceeding. And the other is Ruth Clinesmith, his wife, who was purported to be represented by the Respondent.

And I think the question, in preparing this, that I asked myself was: Are either of these two individuals better off as a result of Mr. Stein's representation than they were before he started?

And I think the answer to that is no. In fact, I think they're worse off. There were no [18] objectives that Mr. Stein enunciated at the outset of his representation that were attained. And I believe that had he gone about the representation of Ruth Clinesmith and Bruce Clinesmith in a less confrontational, less adversarial way.

And if his motive was truly securing the financial independence of these individuals and increasing their standard of living and building this million-dollar home that he spoke of down by the river, this compound with service and walls and security and whatever, that could have been done. But it wasn't done.

What Mr. Stein chose to do instead was circumvent the procedure and file a lawsuit in the Federal Court, trying to set aside the trust that Mr. Clinesmith created that was unsuccessful. He went into Federal Court and tried to gain access to a joint account, which ultimately was unsuccessful. And at the end of the day, he was disqualified from representing everyone.

None of the objectives were attained. And the clients' interests in these cases were certainly not served by anything that Mr. Stein did in the course of his representation.

And the sad thing is that, you know, [19] you're talking about old people who are infirm, who are unable, you know, to look out for themselves. And they placed their trust in a lawyer to basically do the

things for them that they can't do for themselves. And I think it's sad that the people were taken advantage of in the way that they were in this particular case.

And you know, I don't know how many times we've heard Mr. Stein saying, "People don't like me. I'm a tough lawyer. I fight for my clients." Well, you know, all the fighting and all the toughness certainly didn't get him anywhere in this case. And I think that that is an important factor for the committee to consider.

And finally, we're not talking about a new lawyer here. The Respondent was admitted to the Bar in Florida in 1977. He's been practicing a substantial amount of time. He certainly ought to know what the practice of law properly looks like.

And you know, unfortunately, after – my math isn't so good this morning – 30 years of practice, we have the kind of conduct that was engaged in here. Certainly it's not rocket science.

A lawyer doesn't go to a nursing home to see a ward of the court without notifying anybody.

* * *

EXHIBIT Q

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
STATE OF NEW MEXICO

IN THE MATTER OF:

STUART L. STEIN, ESQ. Disciplinary No. 02-2006-505

HEARING
July 30, 2007
9:20 a.m.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico

BEFORE:

MR. WILLIAM G. SHOOBRIDGE,
Board Panel Chair
Paul M. Fish, Board Panel Member
David S. Campbell, Board Panel Member

* * *

[4] indulge me just for a second, because both sides have filed briefing, that it would seem to me – but I will go with whatever the chairman rules – that whether Mr. Widman goes forward first with his portion about the sanctions, and then I would have a response to that, and then he would have a reply, and that we would do the same for the appeal that I filed, where I would have an opening, he would have a response, and then we can get a reply. Either we can do it segregated one after the other, or we can do it together, where Mr. Widman would go first, and then he would have the last as to the sanctions and I would have the last as to the underlying issues.

MR. SHOOBRIDGE: The review panel this morning, while we had you sitting outside, we talked about the amount of time that we would be allotting to each side, and as you may recall, at the scheduling hearing that I had on the telephone, I told each side that my thought was to give each side 30 minutes.

We also discussed this morning that we would give each side some time to do a rebuttal, and we agreed upon 15 minutes. And it's my plan that we will start out –

Mr. Widman, do you agree that you were the [5] first one that asked for?

MR. WIDMAN: Yes.

MR. SHOOBRIDGE: Okay. Then we will start out with your side. And what I would ask is that we cover whatever you want to cover, both on the sanctions part and on the issues regarding whether or not there was prosecutorial misconduct, whether or not Mr. Stein violated any of the rules of professional responsibility, and whether they are supported by the evidence and the findings of fact and conclusions of law by the hearing panel all at the same time.

MR. FISH: And due process.

MR. SHOOBRIDGE: And due process issues, yes, sir. And I would like to remind counsel that we have read, all three of us, hundreds of pages of transcript. We have read all of the briefs, and so there is an awful lot of information we already have before us. It took time for all of us to do that. We have

all reviewed it again before we came up here today. And so going over things that have been argued with the review panel or things that are in your briefs, we have an awful lot of knowledge before we walked into the door here, because of the amount of material.

[6] So with that said, is everybody in agreement with how we are going to get started, with Mr. Widman first, 30 minutes to each side and then 15 minutes on rebuttal. And you can use it however you want in talking about your part on what the appropriate discipline is, and then addressing the issues on due process, prosecutorial misconduct, whether or not the findings and conclusions are supported by substantial evidence.

Mr. Stein, any comments before we begin?

MR. STEIN: I have no problem with that format.

MR. SHOOBRIDGE: All right. Mr. Widman.

MR. WIDMAN: Thank you. I used to appear before a judge who would schedule matters for oral argument, and he would say, I am happy to hear any points you would like to make that aren't in your brief. And the problem with that was, the more comprehensive your brief was, the shorter your oral argument became. And I think that's part of my problem today. There is very little that I have to add to the brief, so I would just like to highlight some things.

The first thing, despite the volume of this file, the conduct that is the subject of discipline

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EXHIBIT R

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
STATE OF NEW MEXICO

IN THE MATTER OF:

STUART L. STEIN, ESQ. Disciplinary No. 02-2006-505

HEARING
July 30, 2007
9:20 a.m.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico

BEFORE:

MR. WILLIAM G. SHOOBRIDGE, Board Panel Chair
Paul M. Fish, Board Panel Member David S. Campbell, Board Panel Member

* * *

[56] MR. STEIN: No, I think under the rules your powers are plenary. You can make different findings, you can make different conclusions, and you can enter different sanctions.

MR. FISH: Well, I agree with you, we can make different conclusions and different sanctions.

Mr. Widman, what is name of that case?

MR. WIDMAN: There is the Estrada case and the Bristol case, and both of those cases – I'm sorry.

MR. FISH: Yes. They both say, I think, that we are stuck with findings of fact. But let me go back. Going back to the chairman's question, 1 through 29, could you look at that and tell me which ones you think are not supported by evidence?

MR. STEIN: Yes. The Estrada case says that – just to complete the thought – "In reviewing a substantial evidence claim" – which is what we have here – "the reviewing body does not look to see whether substantial evidence exists to support the opposite result, but whether such evidence supports the results reached." So with that in mind, let's go through.

MR. FISH: Paragraphs 1 through 29, if you could identify specifically the ones that are not [57] supported or that you are prejudiced because there wasn't discovery, and somehow you would have proved something different.

MR. STEIN: Okay. It would be paragraph No. 3, talking about what the impact of that statute is. It doesn't say what they say it says, No. 4, where it talks about what Linda Vanzi did, collateral estoppel is not to be used. You can't use the court order.

MR. FISH: Well, hang on a second.

MR. STEIN: Sure.

MR. FISH: This says in 4, there was a hearing held. The judge –

MR. STEIN: Okay, well –

MR. FISH: Is that a true statement?

MR. STEIN: Yes. Take out 4.

MR. SHOOBRIDGE: Let's go back to 3.

MR. STEIN: Sure.

MR. SHOOBRIDGE: You say that's not the law, what's wrong with it?

MR. STEIN: Because it doesn't point out, as I pointed out in the brief, that 45-5-402(a) and (b) give exclusive jurisdiction to the court here, but only jurisdiction over property over which is subject to New Mexico law. And as I pointed out in [58] the briefs, all of the assets were out of state, and there was no joining of either Moody Bible or Citigroup in the case. Jurisdiction is always raiseable.

MR. SHOOBRIDGE: Let's move on.

MR. STEIN: No. 4 is fine. No. 5 is again using a court order.

MR. SHOOBRIDGE: Is there anything that's factually incorrect?

MR. STEIN: That's not the point.

MR. FISH: That's the point that what we are trying to figure out.

MR. STEIN: No. I am trying to say if collateral estoppel can't be used – and that's their position –

MR. FISH: You are talking about the conclusion one would reach from this, but is this a correct statement of fact, paragraph 5, finding of fact 5 looking at Exhibit N?

MR. STEIN: No.

MR. CAMPBELL: Was there a hearing on July 18th?

MR. STEIN: Yes, all of this –

MR. CAMPBELL: And during that hearing, did the court disqualify the respondent from representing [59] Bruce Cline Smith?

MR. STEIN: No. Only from Bruce Cline Smith in this matter. And the point is that there was no evidentiary hearing, that we were denied our rights to do that, my client and myself, and when I get to this hearing committee, I am told that we are not going to use the order as collateral estoppel. Now, either that's a correct –

MR. CAMPBELL: So you are saying that the court disqualified respondent from representing Bruce Cline Smith but only in this matter?

MR. STEIN: That's correct.

MR. CAMPBELL: The matter of the guardianship. Did the judge revoke the power of attorney previously granted to Ruth Cline Smith by Bruce Cline Smith?

MR. STEIN: Yes.

MR. CAMPBELL: Did the judge appoint Decades LLC temporary guardian and conservator of Bruce Cline Smith?

MR. STEIN: Yes.

MR. CAMPBELL: And were all these rulings contained in the Court's written order of August 5th?

MR. STEIN: Yes. And that written order is not supposed to be used.

[60] MR. CAMPBELL: I don't know if its helpful, but we need to go through each of these, it sounds like, and find out what precisely the objection is to the finding that has been entered.

MR. FISH: I agree.

MR. CAMPBELL: I can do it this way. It's sort of a cross examination, or you can go through and tell us what sentences in these findings are not factual.

MR. STEIN: Six is okay. Seven is wrong, because you can see, if you read the 1999 trust, it is not the income – principal was not going to be paid to Ruth for the rest of her life. It was just the income. She doesn't get invasion of principal. That was very much upset Bruce. That's one of the reasons why we did this.

MR. FISH: So No. 7 the words "and principal" both places should be deleted?

MR. STEIN: No, just for Ruth. I'm not sure of the other. Eight is fine. Nine is correct. Ten is not true.

MR. CAMPBELL: Tell us why.

MR. STEIN: Well, dependency of the guardianship and conservatorship statute has nothing to do with the ability to file these two lawsuits.

[61] MR. FISH: It just says, Notwithstanding your knowledge of that, you filed two lawsuits. Either you knew about it or you didn't know about it.

MR. STEIN: No, well, I knew about the guardianship or conservatorship, but there is a pejorative spin to each of these statements of fact that are true, that is not the way you are supposed to do pleadings. Pleadings should be, in my opinion –

MR. FISH: Stylistically aside.

MR. STEIN: Stylistically aside, it's a true fact. No, I'm sorry. It doesn't seek to effect the manner in which the estate of Mr. Cline Smith would be managed, expended, and distributed, absolutely not – absolutely not.

MR. FISH: The wills and trusts didn't? No, I'm sorry.

MR. STEIN: The lawsuits don't. If you look at the lawsuits, I am asking the Court to declare that half the money in those two trusts were Ruth's marital property, her community property interest or quasi community property interest. We wanted that. I

said in the lawsuit, that there was pending this guardianship and conservatorship case. Mr. Widman tells the committee that I didn't tell the [62] Court about the guardianship or conservatorship case. I mention it by case number with the assigned judge in the first pleading, the complaint.

MR. FISH: Well, I am looking at the pleadings are G and H, Exhibits G and H are the two complaints, so we can look at those and decide if we think that those –

MR. STEIN: Okay.

MR. FISH: So Exhibits G and H say whatever it is they say.

MR. STEIN: Well, yeah.

MR. CAMPBELL: So we are on paragraph 11.

MR. STEIN: Eleven, okay. That's true, 11 is true. Twelve is true. That hearing, again, that's the same thing as before. That's true, there was a hearing. And 14, it's true, but it can't be used. Worry about that later, I guess.

Fifteen is true in its own – within its own context, but the Court was told that all this was done, because the order in which the power of attorney was revoked was filed by the attorneys for Moody or by Decades, and that's why I said in the brief, you know, is this a race to the courthouse to see who is going to do it first? It's not that I ran to try and do something

before after the power of [63] attorney was revoked to get something or pull something over on the Court.

And 16 is not true, because it was disqualifying respondent from representation of Ruth in the guardianship case.

MR. CAMPBELL: So the words, "any continued representation," you are saying is incorrect because it goes beyond what the court order said?

MR. STEIN: Yes. Or what power the Court even had.

MR. CAMPBELL: So we can look at that order.

MR. FISH: Isn't that what the September 5th order – a I'm reading it now. Paragraph 34. "Mr. Stein and his law firm are hereby disqualified from any continued representation, including as a consulting attorney, of Ms. Cline Smith," and then a number of other individuals. Isn't that what that order says?

MR. STEIN: Yes, it says what it says, but again –

MR. FISH: As to whether or not you agree with it –

MR. STEIN: No. Well, the issue, I think the evidentiary issue is whether or not these orders [64] can even be used. If collateral estoppel is not being raised – and we are very clear about that – then you can't look at these orders.

MR. FISH: Well, Mr. Stein, let me see if I can understand this, because I think there are two separate issues, at least, conceptualizing them.

MR. STEIN: Okay.

MR. FISH: There is the issue of whether a party is bound in a lawsuit with a third party. The other issue is whether a lawyer has a duty to follow court orders. Do you agree? Do you see a difference there?

MR. STEIN: Yeah, I see a very important difference.

MR. FISH: Okay. So would you say the duty of a lawyer to follow court orders is a collateral estoppel issue, or is it something else?

MR. STEIN: The order itself is a collateral estoppel issue. If we want to use the order for the purposes of saying that somebody violated the order or you are not following the order, that's collateral estoppel.

MR. SHOOBRIDGE: Do you think you followed that order?

MR. STEIN: Yes. I stopped representing [65] Bruce in the guardianship case.

MR. SHOOBRIDGE: What about consulting capacity?

MR. STEIN: Oh, I did. I stopped everything. In fact, what I did is that I took it upon myself

– I had to give the file over to another lawyer. This is September 1st, and what I did is that I went down to the courthouse and made a complete copy of all the pleadings in the court file. I had to get the permission of Judge Vanzi to do so. So I would give all the pleadings to the other lawyer, so they wouldn't have anything to look at in my file that may conflict with that order.

MR. SHOOBRIDGE: Let's continue with the findings of fact, if we could, because we are running short on time.

MR. STEIN: Seventeen is correct, because it was a moot point, because they were notified. There is no evidence, other than the error in a pleading that said that I was representing both, but I think at the bottom, at the signature line, it says I was only representing Ruth. That's as to 18.

And when we talk about disqualifying respondent from representing any party in the Moody Bible suit, there is no order that says that. Look [66] at the order of November 21st. I was out of the case. The order of September 1st, it doesn't mention the Moody Bible case, but it says "from representing any party in the Moody Bible case."

MR. FISH: Well, the order of September 1st says – you're right. Okay, go ahead.

MR. STEIN: Okay. But then here is that conclusion, like I should have known about that. And 19 is correct, 20 is correct. Twenty-one, they may

have said that. I don't know if that's true. There may have been a letter to that effect. I don't know. But that's really an unnecessary allegation.

Twenty-two is wrong, "thus barring Bruce Cline Smith from access to the account." That's just a conclusion that somebody made. It was very clear that we wanted to use these monies for Bruce and for Ruth, so she could be his guardian and conservator.

MR. FISH: Is there evidence to support the notion that when the money went to Ruth, in her name only, that Bruce – whether or not you agree with it – that Bruce was therefore unable to get direct access to the funds?

MR. STEIN: Well, he could through the court. There was a case that Mr. Widman brought up [67] that if you have community property in an account, if one spouse takes all that money out, they don't turn it into their sole and separate property. It's still community property. If you are asking, did Bruce have the ability to go down to the brokerage house and get it? The answer is probably no, but that wasn't an issue that came up.

MR. SHOOBRIDGE: When was their divorce filed?

MR. STEIN: The divorce was filed after I left the case. And as I told the committee, when I was asked, you know, what could we do? And I said, I don't know, but, you know, maybe the only thing you can do is get a divorce. Then at least you would get

your money, and then you would be able to go and remarry and take care of your husband.

Twenty-three, I don't agree with that. Jurisdiction of the court, if anything, as I argued in the briefs, it brought that money within easy grasp of the jurisdiction of the Court, because Ruth was before the Court.

I don't agree of his incapacity. He had full mental capacity to sign testamentary instruments. I don't know where that came from. We didn't remove him from the dementia unit and take him [68] to a private room. He was within that dementia unit into a little, like a little TV room where there were chairs and couches. I didn't take him out.

I don't know where this quote comes from, that an absolute owner of such property would have – in paragraph 25. It's a trust, you are a trustee. You don't become the owner of the property. And the effect of the will and trust executed in No. 26 would be to have – remove all of the assets from the jurisdiction of the Court. That's not true. The jurisdiction of the Court was still valid and it had it over Bruce and it had it over Ruth, and if she was the trustee, then the Court had full jurisdiction over the money.

MR. CAMPBELL: Did it have jurisdiction over the money even if the money was in Florida?

MR. STEIN: It would have jurisdiction over Ruth to say you bring the money back from Florida, and that's normally what happens. If there was real

estate – in his reply brief, Mr. Widman talks about the statute saying that the conservator can take possession of real estate outside of the state. Well, that's true, but you have to open up a conservatorship in that state. If the conservator wanted to sell Bruce's property in Florida right now, [69] no one in Florida would accept the deed until they had an ancillary conservatorship in Florida. So they can have a Florida document to say it does it. It is very basic constitutional law.

MR. SHOOBRIDGE: Let's finish up with these, and then I want to move to Mr. Widman, and then you will get 15 more minutes.

MR. STEIN: Okay. No. 27 is true, and Mr. Riedy testified that there was no duty to notify him.

No. 28 is correct. They did file that, and then again with the court hearing, that was – she did void the will and the trust. And she, Judge Vanzi, did and awarded attorney's fees, but again, that order cannot be introduced, because it's collateral estoppel, and they said we weren't going to do it.

And so when you look at the conclusions in paragraph 30(a), it says something was misleading.

MR. FISH: Those, we can look at those. Thank you.

MR. STEIN: Okay.

MR. SHOOBRIDGE: If you would like to make any brief concluding remarks before we go to

Mr. Widman, then you will get another chance before [70] we quit.

MR. STEIN: Okay. I just wanted to quickly touch on the rules which you asked me to do for prosecutorial misconduct. Either we are entitled to the protection of the rules or we are not. And I didn't get the protection of the rules. If you look at Judge Vanzi's letter, her complaint letter, it mentioned certain provisions of the code of professional conduct. If you compare that to the specification of charges, there are way more violations there that I didn't have notice about until I got served.

It was the failure of discipline counsel to follow 17.307(c). They followed 17.307(b) as in boy, because they sent me a copy of the complaint letter. 17.307(c) says they are supposed to let me know what the allegations are prior to filing, so I can give the necessary reasons why they may be misunderstanding something or factors in mitigation, if you want to admit that something is wrong.

MR. FISH: This says the general nature of the allegations. Do you think they have to list every single rule?

MR. STEIN: Absolutely, they have to. Those are general allegations. Unless you have that, [71] then you are always shocked. They didn't follow 17.307(d).

MR. FISH: So general means specific?

MR. STEIN: No. General means you don't have to get into everything, but tell me what particular rules I am accused of violating.

MR. SHOOBRIDGE: What were you shocked about compared to Judge Vanzi's letter and what was filed.

MR. STEIN: Fraud, misrepresentation – nothing at all in Judge Vanzi's letter about fraud or misrepresentation nothing. Judge Vanzi says in the letter, I don't understand the privacy issues. That's the position my clients wanted me to take to open up the hearings, and she is making a complaint about it.

MR CAMPBELL: So you are saying that because Judge Vanzi did not use the words fraud or misrepresentation, that it can't be alleged now by disciplinary counsel?

MR. STEIN: It can be alleged, but they have to give me notice before they file the specification of charges. Look what Mr. Widman wrote in his response. He said, we have people who write to our office who may be inarticulate, who may not be [72] educated. They just tell us we are complaining about the lawyer. If they just file charges against the lawyer, without telling him, prior to the filing of the specification of charges, what rules we are investigating about you and could you give us some more clarification, so we understand your position here. They violate 307(c). We have to know what those general things are. We think that you violated these particular rules.

MR. SHOOBRIDGE: Okay. You have got a couple minutes, two minutes, and then we are going to go.

MR. STEIN: Same thing with 17.307(d), it looks like they violate that all the time. 17.307(e), she orally agreed to do this, and again this is information that can't even come here. We talked about that, and if they charge fraud, it has to be pled with specificity.

MR. FISH: You won that.

MR. STEIN: No, I didn't win that, because Part of fraud may be the misrepresentations. What is fraud? Fraud is a material misrepresentation of fact to have someone do something to their detriment and to your benefit. So if they were having the ability, if they were required to plead fraud with [73] specificity, part of a fraud complaint would be the misrepresentation. If the misrepresentation could stand as an independent violation of the rules of professional conduct, I would have been on notice, but I wasn't on notice.

And then as far as the prosecutorial misconduct, I think those matters speak for themselves. Even today, Mr. Widman talks about my website. You can go to my website. I haven't heard anyone say that the things that were on the website were untrue.

The question about 45-5-402, there was nothing, nothing in Judge Vanzi's letter that mentioned that statute. It was heard in the hearing committee that Judge Vanzi was told about that by Mr. MacKenzie,

and Judge Parker was told about that statute by Mr. Reid, and neither of those judges did anything about it, because they agree, I think, with me, that it had no application.

MR. SHOOBRIDGE: Okay. Thank you, Mr. Stein. I'm going to move now to Mr. Widman, and we will come back to you here shortly.

MR. CAMPBELL: You up for a break?

MR. SHOOBRIDGE: Yes. Let's take a five minute break.

[74] (A recess was taken.)

MR. WIDMAN: Before I begin, are there any particular issues that the panel would like for me to address?

MR. SHOOBRIDGE: What about, Mr. Stein has taken the position that you can be professional and ethical, as I understand it, by remaining silent, if there are facts that may be adverse to your client's position. And another issue I would like to hear about is that the conservatorship, guardianship is a separate proceeding from the case filed in federal court as far as what disclosure you might make.

MR. WIDMAN: With respect to the first issue, I think there is a difference between – there may be a difference – and it's kind of difficult to address this as a hypothetical. You don't necessarily have a duty to volunteer information about a client in the context of a civil proceeding unless it's requested

in the course of discovery. On the other hand, I think there is a duty of candor towards the Court. And if you have filed a lawsuit pursuant to a power of attorney that no longer exists, I think you have a duty to disclose that. I think the duty of candor in the court requires that you do that.

[75] With respect to the disclosure of information that you have regarding a client, I think – and again, its difficult to talk in the abstract, but I think one of the issues is whether or not a failure to disclose would work a fraud on the other party or misrepresentation on the other party, and that is the best as I can do on that.

MR. FISH: Mr. Stein seemed to indicate that the power of attorney revocation, these things were disclosed by other parties immediately so that fact that –

MR. WIDMAN: I'm sorry.

MR. FISH: Mr. Stein seemed to indicate that these matters were disclosed to the Court by the opposing parties almost immediately after they happened. The impression I have is, and therefore why did he have to say it also?

MR. WIDMAN: They weren't disclosed – the record indicates they weren't disclosed, I don't believe, until substantially later, because it wasn't until the fall that that lawsuit was ultimately – where the parties were realigned and that lawsuit

was ultimately dismissed. In fact, as of November, that case was still going on.

Exhibit U is an order entered in the Moody [76] Bible case on November 21, 2005. And incidentally, in that order it recites, "Mr. Stein purports to represent Bruce Cline Smith in this action." The state court proceeding was substantially related to this case. Both cases involve Bruce Cline Smith's finances, specifically the Moody Trust assets. So they indicate in that order that his representation of Bruce Cline Smith was continuing up to the date of that order, and I believe that order is the basis for the finding of the committee to that effect.

Now I would like to go back to Mr. Shoobridge's question. If you could restate that for me?

MR. SHOOBRIDGE: Well, I was trying to get your take on, the way I was hearing in part Mr. Stein argued that the Judge Vanzi, in the conservatorship guardianship proceedings, had restricted his activities, but it was limited to that case, and that didn't affect his ability to proceed in federal court with the Moody litigation.

MR. WIDMAN: Well; the July 18th order, which is embodied in the written order of August 5th, which is this Exhibit N, as in Nancy, paragraph two, page two, says, "A motion to disqualify Stuart Stein from representing Bruce Cline Smith is well taken and

* * *

APPENDIX S

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT OF
THE STATE OF NEW MEXICO

In the Matter of

STUART L. STEIN, ESQ.

An Attorney Licensed to
Practice Before the Courts
of the State of New Mexico

Disciplinary No.
02-2006-505

DECISION OF THE HEARING PANEL

THIS MATTER came before the undersigned Disciplinary Board Panel for oral argument on July 30, 2007, after assignment for review by the Chair of the Disciplinary Board pursuant to Rule 17-314 of the Rules of Governing Discipline. The Respondent and Joel L. Wildman, Deputy Disciplinary Counsel, appeared in person. The proceedings were stenographically recorded. The Board Panel reviewed the transcripts of the Panel Hearing, pleadings filed in the case, the briefs filed by the parties, and heard the arguments of counsel on the issues in each parties Request for Oral Argument and Submission of Briefs and pleadings filed in the case.

The Board Panel finds as follows:

1. Respondent basically agreed with each Finding of Fact of the Hearing Committee with his limited objections being either stylistic or immaterial to the conclusions.

2. The evidence supports the Findings of Fact and Conclusions of La of the Hearing Committee, which are approved by the Panel.

3. The Hearing Committee did not abuse its discretion in denying Respondent discovery. Respondent was not prejudiced or surprised by the evidence presented by Deputy Disciplinary Counsel and Respondent was given a full opportunity to answer all charges.

4. Respondent was not denied due process by the Hearing Committee, nor did the actions of Chief Disciplinary Counsel or the Deputy Disciplinary Counsel constitute "prosecutorial misconduct."

5. Respondent received a Formal Reprimand in Disciplinary No. 06-2003-458 on November 18, 2005, concerning violations of Rule 16-107(a) involving similar conflict of interest issues. Respondent maintains he did not violate the Rules of Professional Conduct therein or in the present preceding.

6. The Disciplinary Board Panel finds the following factors to be considered in imposing sanctions set out in the ABA *Standards For Imposing Sanctions* are supported by the evidence herein:

§4.3 Failure to avoid conflict of interest

§4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of clients:

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of present or former client are materially adverse and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

§5.1 Failure to maintain personal integrity

§5.11 Disbarment is generally appropriate when:

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

§6.1 False statements, fraud and misrepresentation

§6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding.

§6.2 Abuse of the legal process

§6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

§9.0 Aggravation and Mitigation

§9.1 After misconduct has been established aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

§9.22 Factors which maybe considered in aggravation

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(g) refusal to acknowledge nature of conduct;

(h) vulnerability of victim; (the husband who was under court supervision)

(i) substantial experience in the practice of law;

§9.3 Mitigation

§9.31 Mitigation or mitigating circumstances or any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

§9.32 Factors which may be considered in mitigation. (none were found herein)

§9.4 Factors which are neither aggravating or mitigating

(b) agreeing to the client's demand for certain improper behavior or result;

(f) failure of injured client to complain

THEREFORE it is the unanimous recommendation and decision of the Disciplinary Board Panel that the recommendations of the Hearing Committee are modified as follows:

1. The appropriate sanction in this case is disbarment of Respondent's license to practice law for no less than five (5) years, and a motion for permission to apply for reinstatement may not be filed for a period of at least five (5) years from the effective date of the disbarment pursuant to Rule 17-214.

2. Respondent should be assessed the costs of this action, to be paid within ninety (90) days from this decision.

Respectfully Submitted,

/s/ William G.W. Shoobridge
WILLIAM G.W.
SHOOBRIDGE, ESQ.
Board Panel Chair

/s/ Paul M. Fish
Paul M. Fish, Esq.
Board Panel Member

/s/ David S. Campbell
David S. Campbell, Esq.
Board Panel Member

Dated: August 7, 2007

I certify that a true copy
of the foregoing was e-mailed
and mailed to Joel L. Widman
and Stuart L. Stein this 7th
day of August, 2007.

/s/ William G.W. Shoobridge
William G.W. Shoobridge, Esq.

EXHIBIT T

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

NO: 17,349

IN THE MATTER OF
STUART L. STEIN, ESQUIRE.

DISCIPLINARY PROCEEDING

December 19, 2007

For the Petitioner: MR. JOEL L. WIDMAN

For the Respondent: MR. STUART L. STEIN

* * *

[19] decide the facts? What will be their spin on the facts? I have a right to know. My license is on the line.

If we look at the specification of charges and say it's unclear, I say it's incomprehensible. Someone with more of a prosecutorial bent would say, well, maybe it's a little unclear. Well, if I had the right to do interrogatories to say please tell me what specific things I did or failed to do that violate this portion of the rules of professional conduct that you are charging in this specification of charges, very simple. And this case was so simple from Mr. Widman's point of view. If the facts were so clear then it would have been distilled for me, but it wasn't.

JUSTICE DANIELS: Was there anything at the hearing that surprised you in terms of not knowing of its existence before?

MR. STEIN: I don't think so, but I didn't know what the impact was. In other words, I mean one example would be this. I have a specification of charges without different counts. It gets to the end and then in paragraph 48 it goes from small letter a to whatever the final letter is of violations. It is only after the hearing was completely over and the

* * *

EXHIBIT U

BEFORE THE DISCIPLINARY BOARD OF
THE SUPREME COURT OF THE
STATE OF NEW MEXICO

In Re:

STUART L. STEIN, ESQ.
An Attorney Licensed
to Practice before the
Courts of the State of New
Mexico,

Respondent.

Disciplinary No.
02-2006-505

HEARING TO CONSIDER MATTERS IN AGGRAVATION AND IN MITIGATION

TRANSCRIPT OF PROCEEDINGS

April 2, 2007

9:08 a.m.

Law Offices of Shapiro, Bettinger and Chase, LLP
7411 Jefferson Street, NE
Albuquerque, New Mexico

COMMITTEE CHAIR: Robert P. Tinnin, Esq.

PANEL MEMBERS: Gregory W. Chase, Esq.
Carolyn Tinker

* * *

[33] She goes to the three-member panel, and she asks for six months. They give her 90 days. When the Chief Justice of the New Mexico Supreme Court asked her in oral argument, "How much punishment

did you ask at the hearing committee and at the appeal," she didn't know. She couldn't remember because these things mean nothing. Let's just get the lawyer.

And it turned out I had to stand up and tell my lawyer to tell the Chief that she asked for a year and then six months. And then she said, "Oh, yeah. That's right."

That's what we're dealing with. It's procedurally wrong. This all can go away with a private reprimand, and you could write it. And I don't know what you could write. I don't know what all these findings mean.

But as far as mitigation is concerned, I did nothing wrong. I know you found differently. But without discovery to show you in full relief what has gone on, there's no way to do it.

There is something wrong with the system, Mr. Chairman and members of this committee, where a judge writes a letter of complaint to the Bar, and the lawyer accused by the judge can't question this

* * *

EXHIBIT V

BEFORE THE DISCIPLINARY BOARD OF
THE SUPREME COURT OF THE
STATE OF NEW MEXICO

IN THE MATTER OF: STUART L. STEIN, ESQ. — Disciplinary No. 02-2006-505

HEARING
July 30, 2007
9:20 a.m.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico

BEFORE:

MR. WILLIAM G. SHOOBRIDGE, Board Panel Chair
Paul M. Fish, Board Panel Member
David S. Campbell, Board Panel Member

* * *

[105] You are from out of state, so therefore you didn't know about it, and you had a duty and you didn't do it. It's not there.

We had Mr. Reid come on. He doesn't like me. He said it on the stand.

And I didn't do anything wrong. There is no substantial evidence to prove any of these conclusions. And Mr. Widman yells at me, and the chairman kind of made a point about it, do I think that the public reprimand is a slap on the wrist? No, it's a serious matter.

But here I didn't do anything wrong. I didn't feel I did anything wrong in the Bogarosh matter, but they said I should have followed up. I said, well, okay. But here I followed up. I did everything my clients wanted, and it's to no avail, because the other side didn't like it.

MR. SHOOBRIDGE: All right. Thank you very much. I'm going to close the record at this time, We will take it under advisement. We are in adjournment.

MR. WIDMAN: Thank you.

MR. SHOOBRIDGE: Thank you.

MR. STEIN: Thank you.

(The hearing adjourned at 11:52 a.m.)

* * *

EXHIBIT W

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

NO: 17,349

IN THE MATTER OF
STUART L. STEIN, ESQUIRE.

DISCIPLINARY PROCEEDING

December 19, 2007

For the Petitioner: MR. JOEL L. WIDMAN

For the Respondent: MR. STUART L. STEIN

* * *

[10] were trying to do is remind the hearing committee that the last time on the Bogarosh case that they gave 15 days. It then went to 90 days, and then this Court said it was a public reprimand. What I was trying to show to them is that they were looking at what I did much more severely than this Court did, and I was trying to show that there was really no proof of anything at this particular case.

Mr. Widman says that I said I did nothing wrong. I didn't say that. I'll say that to this Court. There was nothing proved. There was nothing alleged. All we have are conclusions based on facts. I filed two federal lawsuits on behalf of my clients. I represented them in a guardianship and conservatorship matter, and everybody said you're not allowed to do that and therefore you have a conflict of interest, but no one

ever articulated the conflict of interest. And all the other things that were said, as I'll get into in my presentation, were just not proved.

JUSTICE DANIELS: Are you saying there was no conflict of interest or they just didn't sufficiently allege conflict of interest?

MR. STEIN: Well, if we look at the record, they didn't prove it. If you're asking me, Justice [11] Daniels, was there a conflict of interest, the answer is no, and there wasn't. The other things that were said here that were quoted that Mr. Shoobridge said to me, well, you read Judge Vanzi's letter. What is your recollection? And I said I don't think Judge Vanzi likes me. And the proof of that pudding is that – and this came out before the hearing committee. When the issues came up about what happened in the Clinesmith matter and there was a hearing on less than 24 hours notice, we all have to run to court, and the judge, Judge Vanzi, starts interrogating me, starts questioning the lawyers from the other side, and then I say to Judge Vanzi, but, Judge, you haven't heard the other side yet. And her quote in the record is, "I don't need to hear the other side." When I'm before a judge who will say on the record they don't have to hear the other side that includes my client's position, and in this particular case and instance, my position, I find that is not appropriate, and that indicates to me a personal animus by the judge against either me or my client.

The court should also take into consideration that when Judge Vanzi's letter was written, she was still sitting on that guardianship case. She has not yet ruled, yet she has spent, I

* * *

EXHIBIT X

Rules Governing Discipline

Preface

The Supreme Court has the inherent power and the duty to prescribe the qualifications that shall be required for admission to practice law; to admit persons to practice law; to prescribe standards of conduct for lawyers; to determine what constitutes grounds for the discipline of lawyers; to discipline, for cause, persons admitted to practice law in this state; and to revoke the license of every lawyer whose unfitness to practice law has been duly established.

The purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the person disciplined.

Only persons of integrity and good character should be permitted to practice law.

Persons admitted to practice law in this state are a part of the judicial system of the state and officers of its courts.

A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.

An attorney who has been suspended and who seeks readmission has the burden of establishing by clear and convincing proof that he possesses the qualifications for readmission, which should not be less than those required for original admission.

It is the obligation of the organized bar and the individual lawyer to give unstinted cooperation and assistance to the Supreme court, and its agency the disciplinary board, in discharging its function and duty with respect to discipline and in purging the profession of the unworthy.

In the exercise of its inherent jurisdiction to admit persons to practice law and to discipline, for cause, all such persons, the Supreme Court adopts and promulgates the following rules which shall govern disciplinary proceedings against members of the New Mexico bar and all attorneys within this court's jurisdiction.

* * *

EXHIBIT Y

N.M.R.A. 17-306 (2008) Required presence of attorney; subpoena power

A. During investigation.

(1) Disciplinary counsel, at any stage of an investigation after the respondent-attorney has been notified of the investigation, may serve interrogatories on the respondent-attorney. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them. The respondent-attorney shall serve a copy of the answers and objections, if any, to the office of disciplinary counsel within thirty (30) days after service of the interrogatories. The chair of the Disciplinary Board may allow a shorter or longer time in which to file answers upon a motion filed by either the respondent-attorney or disciplinary counsel within ten (10) days of service of the interrogatories on the respondent-attorney. The interrogatory answers may be used by disciplinary counsel at any future hearings in the investigation.

(2) Disciplinary counsel at any stage of an investigation after the respondent-attorney has been notified of the investigation, may request or invite the respondent-attorney to appear before a reviewing officer and answer questions related to allegations under investigation by disciplinary counsel. The invitation or request shall be accompanied by a statement from disciplinary counsel describing the allegations being investigated and

the areas about which the respondent-attorney will be asked to comment. At an appearance before a reviewing officer, the respondent-attorney has a right to the presence of counsel, the right to make opening and closing statements and the right to introduce documentary evidence. A taped record will be made of the respondent-attorney's responses, a copy of which will be provided to the respondent-attorney.

(3) The chair of the disciplinary Board, at any stage of the investigation after the respondent-attorney has been notified of the investigation, may issue a subpoena for the production of records and other documents of the respondent-attorney or any other witness necessary to the investigation as well as for requiring the presence and testimony of witnesses or the respondent-attorney under oath. The respondent-attorney shall have notice of the subpoena, shall have the right to be present and cross-examine witnesses and shall have the right to be accompanied by counsel.

(4) If it appears that the respondent-attorney or a witness may alter, destroy, secrete or remove from the jurisdiction of this state any books, records, documents or other evidence relevant or material to an investigation, at any stage of the investigation, disciplinary counsel, if authorized by the Disciplinary Board may petition the Supreme Court for an order to compel the attendance of witnesses before a hearing committee and the production before a hearing committee of any books, records, documents or other evidence relevant or material to an investigation before notifying the

respondent-attorney. The petition shall contain or have attached a sworn written statement of facts showing probable cause to believe that the records may be altered, destroyed, secreted or removed from the State of New Mexico. Any and all proceedings before the Supreme Court pursuant to this subparagraph shall be conducted in camera and shall be kept under the seal of the Supreme Court.

B. Formal disciplinary proceedings. At request of either disciplinary counsel or the respondent-attorney, the chair of a hearing committee may issue subpoenas:

(1) requiring the presence of a witness at a deposition for discovery which has been authorized pursuant to Rule 17-311 NMRA and which, if so authorized, may command the witness to produce the designated books, papers, documents or tangible things;

(2) requiring the person to whom the subpoena is directed to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises at a specified time and place. A command to produce evidence or to permit inspection may be joined with a command to appear at a hearing or at deposition, or may be issued separately;

(3) requiring the presence of witnesses at a formal hearing before a hearing committee or the Disciplinary Board;

(4) commanding the person to whom it is directed to produce at a formal hearing before a

hearing committee the books, papers, documents or tangible things designated therein.

C. Contents. No subpoena shall be issued pursuant to this rule unless it sets forth:

(1) the reason or purpose for the investigation or hearing;

(2) with reasonable definiteness, any records or other documents to be produced which are relevant to the investigation or hearing;

(3) a statement that the witness has a right to be accompanied by counsel; and

(4) the date, time and place at which the witness is to appear.

D. Enforcement.

(1) Failure to cooperate with an investigation of the Disciplinary board, or failure to respond to letters from disciplinary counsel regarding an investigation shall be grounds for submission of a motion to the Supreme Court to order that the offending respondent-attorney be held in contempt of court.

(2) Any person who has been served with a subpoena pursuant to this rule may apply to the officer issuing the subpoena for an order to quash the subpoena. If any person fails to comply with a subpoena issued by the chair of the Disciplinary Board or the chair of a hearing committee in accordance with the provisions of this rule or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, at the request of the officer issuing the subpoena, disciplinary counsel

may apply to the supreme court for an order directing that person to take the requisite action. The Supreme Court may issue such order or may quash the subpoena. Should any person willfully fail to comply with an order of the Supreme Court, the court may punish such person for contempt of court.

E. Subpoena; request of another jurisdiction. The chair of the Disciplinary Board, or a member of the board designated by the chair, may issue a subpoena to compel the attendance of witnesses and production of documents in this state for use in lawyer disciplinary or disability proceedings in another jurisdiction. The subpoena may be requested by disciplinary counsel of this state when the request is by the disciplinary authority of the other jurisdiction, or an attorney admitted to practice in this state when the request is by a respondent in a proceeding in another jurisdiction. The person seeking the subpoena shall certify that the subpoena has been approved or authorized under the law or disciplinary rules of the other jurisdiction. Service, enforcement and challenges to a subpoena issued pursuant to this paragraph shall be in accordance with the Rules Governing Discipline.

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(3)

No. 07-1442

Supreme Court, U.S.
FILED
AUG - 5 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STUART L. STEIN, ESQUIRE,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

**On Petition For A Writ Of Certiorari To
The Supreme Court Of New Mexico**

REPLY TO BRIEF IN OPPOSITION

STUART L. STEIN, ESQ.
THE STEIN LAW FIRM
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Santa Fe, NM 87592
505-450-5002
info@steinlawfirm.com

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	v
REPLY BRIEF	1
STATEMENT OF THE CASE	1
Complaint by District Judge	1
No Charge of Disobeying Court Order	2
Denial of All Discovery	4
Articulated Notice of Violation of Court Order Is Required	4
Extraordinary Writ	5
Petitioner's Web Site	6
Evidence: Surprise/Not Surprise	7
RESPONDENT'S REASONS TO DENY WRIT	7
I. DUE PROCESS RIGHTS WERE INFRINGED	8
A. Objection to Admission of Web Site Preserved Review	9
B. Petitioner Was Not Aware of Charges: They Were Not Articulated in the Specification of Charges	9
C. Specification of Charges Fail to Allege Misrepresentation and Fraud	10
D. No Discovery Tools Were Available	11
E. Standard of Proof: Preponderance or Clear and Convincing	12

TABLE OF CONTENTS – Continued

Page

II. PETITIONER'S FIRST AMENDMENT RIGHTS WERE IMPLICATED 13

CONCLUSION 14

TABLE OF APPENDICES

Appendix FF October 14, 2005 Letter of Petitioner to Joel L. Widman, Esq. ..... App. 1

Appendix GG New Mexico Rule 17-310 (2006) ..... App. 5

TABLE OF AUTHORITIES

Page

CASES:

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 12, 13

Arizona v. Fulminante, 499 U.S. 299, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 12

Crawford-El v. Britton, 523 U.S. 574, 188 S.Ct. 1584, 140 L.Ed.2d 759 (1998) 13

Hartman v. Moore, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) 9, 13

Konigsburg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957) 6

In re Kramer, 282 F.3d 721 (9th Cir. 2002) 14

Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 12

In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 5, 11, 14

Statosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) 12

In the Matter of Stein, 2008-NMSC-013, 117 P.3d. 513 ..... *passim*

Stein v. Disciplinary Board of the Supreme Court of New Mexico, 520 F.3d 1183 (10th Cir. 2007) 6

Theard v. U.S., 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) 7

Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) 13

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment.....6, 13, 14

Fifth Amendment 12

Fourteenth Amendment 12, 14

RULES:

SUPREME COURT OF THE UNITED STATES

Rule 15.2 2

Rule 16.1 .....5, 14

NEW MEXICO

N.M.R.A.16-109(A) 10

N.M.R.A.17-309 (2006).....2

N.M.R.A.17-310 (2006).....3

N.M.R.A.17-310 (2008).....3

N.M.R.A.17-311 (2006).....4

N.M.R.A.17-311 (2008).....4

INTRODUCTION

References to the Brief in Opposition will be by pages (Br.Opp. page XX) and its Appendix by designated letter and page (Br.Opp. Exhibit A, App. XXX).

References to Petition for a Writ of Certiorari will be by pages (Pet.Writ.Cert. page XX) and its Appendix by designated letter and page (Pet.Writ.Cert., Exhibit A, App. XXX).

References to the appendix material in this Reply will be by designated letter and page (Reply Exhibit FF, App. X).

REPLY BRIEF

STATEMENT OF THE CASE.

Respondent submits a 14-page alternative Statement. Br.Opp. pages 1 to 14. Petitioner's objections are outlined below.[1]

Complaint by District Judge.

Respondent presents the complaint letter from the New Mexico District Court Judge. Br.Opp. page 1; Br.Opp., Exhibit A, App. 1. Petitioner's response sought assurances that should charges be filed discovery would be available. Br.Opp. page 2; Br.Opp., Exhibit C, App. 21. Respondent condemns this request. Br.Opp. page 2.

By omission, Respondent indicates that Petitioner did not substantively respond. Br.Opp. page 2. However, Petitioner did respond on October 14, 2005. Reply Exhibit FF, App. 1. It pointed out:

> If Judge Vanzi felt that any actions of this writer were in violation of any order entered by the Court, a Motion for Contempt should have been filed by the other attorneys in the case or Judge Vanzi should have issued her own Order to Show Cause why this writer should not be held in contempt. No attorney filed any such motion and Judge Vanzi did not issue any Order to Show Cause.

Id. at App. 2.

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[1] Petitioner adds subject headings.

No Charge of Disobeying Court Order.

The Specification of Charges did not charge Petitioner with disobeying a court order. Pet.Writ.Cert., Exhibit BB, App. 194. The logical conclusion is that the Order violation claim was investigated and not substantiated. As noted in the Petition:

> Petitioner was never put on notice before the proceedings that he was on trial for violation of court orders. fn. 5
>
> > fn.5 The Chair of the Hearing Committee agreed on the record that there was no charge of violating a court order in the Specification of Charges, but lack of a written charge did not stop that ultimate finding in the Opinion [of the New Mexico Supreme Court] and disbarment . . .

Pet.Writ.Cert. page 17, footnote included. These facts were not traversed. Sup.Ct.Rule 15.2.

Respondent claims it followed N.M.R.A.17-309 in filing the Specification of Charges. Br.Opp. page 3. It did so incorrectly.

Rule 17-309 (2006) contemplates separate counts for each charge. Br.Opp., Exhibit D, App. 23 (" . . . The specification of charges shall contain: (1) a brief and plain statement of the charge, ***or if more than one, each of the separate charges*** of professional misconduct asserted against the respondent-attorney;" emphasis supplied). There was no separation of charges.

Respondent claims that the Specification of Charges " . . . tied the allegations of violative conduct to the specific rules . . . violated." Br.Opp. page 3. A plain reading of the Specification of Charges belies this contention. Pet.Writ.Cert., Exhibit BB, App. 194. The inability to understand what conduct violated what specific Rule of Professional Conduct was raised as a Due Process violation in the Motion to Dismiss. Pet.Writ.Cert. page 5; Pet.Writ.Cert., Exhibit AA, App. 188.

Respondent writes:

> The rules also required Petitioner to admit or deny the charges, ***to provide any matter in mitigation***, and to identify witnesses . . . Petitioner chose not to comply with the rules and never provided any relevant or material evidence . . . that could explain his conduct. He also failed to designate any ***"matter in mitigation."***

Br.Opp. page 4, emphasis supplied, citing N.M.R.A.17-310 (2008) Br.Opp., Exhibit F, App. 40. This Rule was amended on January 15, 2007. The superceded rule required an accused lawyer to provide or include:

> (2) any matter in mitigation ***in connection with any admitted violations***;

N.M.R.A.17-310 (2006), emphasis supplied. Reply Exhibit GG, App. 5. Petitioner did not admit any violations and therefore did not include matters in mitigation.

Denial of All Discovery.

Respondent chastises Petitioner's failure to request discovery until his Motion to Dismiss was ruled upon. Br.Opp. page 4. Requesting discovery after pleadings are closed avoids duplication and expense.

Two discovery motions were filed. Pet.Writ.Cert., Exhibit V, App. 148; Exhibit R, App. 115. They were filed under N.M.R.A.17-311 (2006). Pet.Writ.Cert. page 4. The rule requires a "showing of need." *Id.* Petitioner showed such need. They were both denied for Respondent " . . . failed to demonstrate and establish sufficient need to conduct discovery proceedings . . . " Pet.Writ.Cert., Exhibit S, App. 121; page 106. There are no reported cases on either N.M.R.A.17-311 (2006) or (2008). The New Mexico Supreme Court has announced no criteria for either "a showing of need" under the superceded rule or a "showing of good cause" of the current rule.

The Committee Chair was asked to explain his ruling on the record as to how the burden of showing need is to be met for the purposes of appellate review. He refused to do so.

Articulated Notice of Violation of Court Order Is Required.

Respondent claims Due Process notice is adequate and meets Constitutional muster when the subject order is "referenced and identified" in the

charging document without any statement that its violation is the basis for discipline. Br.Opp. page 6. This ignores *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

This untenable position is a basis for this Court to Order a summary disposition of the Petition under Sup.Ct.Rule 16.1.

Extraordinary Writ.

Respondent cites Petitioner's Petition for Extraordinary Writ. Br.Opp. pages 7-8, Exhibit M, App. 111. Respondent claims it was filed " . . . after several days of hearing but before the hearing was concluded." Br.Opp. page 7. The Exhibit refutes this claim.

The Petition for Extraordinary Writ was served on July 15, 2006. Br.Opp., Exhibit M, App. 111 at 119. The first day of the evidentiary hearing was August 28, 2006. Br.Opp. page 6.

The assigned disciplinary case number on the matter at bar is 02-2006-***505***. Br.Opp., Exhibit E, App. 27 (Specification of Charges, emphasis supplied.) The Petition for Extraordinary Writ was directed to another case: 02-2006-***507***. Br.Opp., Exhibit M, App. 111 at 113, emphasis supplied.[2] Similar denial of

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[2] Petitioner admits history with both the New Mexico Supreme Court and its Office of Disciplinary Counsel, *e.g.*, Petitioner was successful in changing unconstitutional lawyer

(Continued on following page)

discovery was suffered in this other case. The Petition for Writ was denied. When this other disciplinary hearing commenced, the complaining witness gave testimony conflicting with a statement she had previously sworn to, thus undermining the prosecution. The case was settled and dismissed.

Petitioner's Web Site.

Respondent claims copies of Petitioner's Web Site were introduced without objection. Br.Opp. page 9. Raising the First Amendment as a shield against the Web Site materials introduced is a valid objection preserving appellate review. Pet.Writ.Cert. pages 8 and 9 with citations to the record. *See, Konigsburg v. State Bar of California*, 353 U.S. 252, 258, 77 S.Ct. 722, 725-26, 1 L.Ed.2d 810 (1957) (claiming, generally, the actions of the bar committee was an unconstitutional violation of applicant's First Amendment rights is adequate for federal question jurisdiction where California Supreme Court considered and rejected the argument.)

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advertising rules in New Mexico. *See, Stein v. Disciplinary Board of the Supreme Court of New Mexico*, 520 F.3d 1183, 1886 (10th Cir. 2007) (Mr. Stein and his firm have apparently won a long struggle over the application of state disciplinary rules to their advertising. . . .)

Evidence: Surprise/Not Surprise.

Respondent at pages 12 and 13 of the Brief in Opposition notes Petitioner was not "surprised" at the content of the Specification of Charges or the evidence presented. That is not the issue. Knowledge of an Order entered is ***not*** notice that Petitioner was charged with its violation since it was not articulated in the Specification of Charges. The New Mexico Supreme Court acknowledged Petitioner's problem. Pet.Writ.Cert., Exhibit A, App. 1 at 33-34, *In the Matter of Stein,* 2008-NMSC-013, 177 P.3d 513, ¶ 59. Yet, two months after Petitioner was disbarred, the issued Opinion adopt Respondent's position that Petitioner " . . . was barred from collaterally attacking the orders ***he was charged with violating***." *Id.* at ¶ 53, App. 30, emphasis supplied. *See also, id.* at ¶ 64, App. 37.

RESPONDENT'S REASONS TO DENY WRIT.

Respondent cites *Theard v. U.S.*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) that Petitioner's Web Site was only used as evidence that Petitioner did not acknowledge that his conduct was wrongful, " . . . thus to assess whether he might engage in the conduct again." Br.Opp. page 15. The Opinion did not use the Web Site for this purpose. *See*, Section I., A below.

Further the Web Site was not included in the Specification of Charges as a factor in aggravation. Pet.Writ.Cert., Exhibit BB, App. 194 at 204-205. The written findings of Petitioner's violations were issued by the Hearing Committee on March 9, 2007. No

supplement to the Specification of Charges giving adequate notice that Respondent was adding the Web Site as a factor in aggravation prior to the Aggravation and Mitigation Hearing of April 2, 2007 was accomplished.

I. DUE PROCESS RIGHTS WERE INFRINGED.

The Specification of Charges gave no notice that Petitioner was being charged with violation of a court order as a reason for disbarment; what facts constituted the conflict of interest for Petitioner's disbarment; and what facts constituted misrepresentation to the two federal courts for which he was disbarred.[3] There was no notice in the Specification of Charges as to the existence of any " . . . duty to inform the court and interested parties in the guardianship and conservatorship proceeding of the filing of the federal lawsuits . . . " for which he was disbarred. *See, In the*

---

[3] The opinion found that " . . . Respondent never notified the federal courts of the pending guardianship and conservatorship proceeding." *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 31. Pet.Writ.Cert., Exhibit A, App. 1 at 17. Yet, in both Complaints, the guardianship and conservatorship case was clearly mentioned or referenced in attachments with the style of the case and a state case number. Pet.Writ.Cert., Exhibit BB, App. 194.

Matter of Stein, 2008-NMSC-513, 177 P.3d 513, ¶ 36, Pet.Writ.Cert., Exhibit A, App. 1 at 20.

The Specification of Charges contained no proper or adequate notice of any charges for which Petitioner was ultimately disbarred.

A. Objection to Admission of Web Site Preserved Review.

The Constitutional objection to the introduction of Petitioner's Web Site was discussed above. *See,* page 6, above.

The New Mexico Supreme Court Opinion's reference to the Web Site notes Petitioner's displeasure with the Disciplinary Board. Pet.Writ.Cert., Exhibit A, App. 1 at 40. *In the Matter of Stein,* 2008-NMSC-013, 177 P.3d 513, ¶ 71. Expressing displeasure with government is protected core political speech and cannot be used to impose a punishment. *See, Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 1701, 164 L.Ed.2d 441 (2006).

B. Petitioner Was Not Aware of Charges: They Were Not Articulated in the Specification of Charges.

Respondent claims adequate notice of charges arising from violations of a court Order:

> . . . Petitioner was put on notice of the Rules of Professional Conduct that are implicated when an attorney violates a court Order.

> (*See,* Specification of Charges ¶ 48.d attached as Exhibit E). Petitioner's argument is logically flawed since there was no finding or conclusion of violation of a court's Order that was a basis of Petitioner's discipline.

Br.Opp. page 20. Yet the Opinion of the New Mexico Supreme Court held that Petitioner " . . . intentionally violated the plain terms of Judge Vanzi's order . . . " in accepting the recommendation of disbarment. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 63, Pet.Writ.Cert., Exhibit A, App. 1 at 37. *See* Evidence: Surprise/Not Surprise at page 7, above.

The Specification of Charges makes no claim that Rules of Professional Conduct are implicated when an attorney violates a court Order. There is no mention in ¶ 48.d that a violation of N.M.R.A.16-109(A) of the New Mexico Rules of Professional Conduct occurred because Petitioner violated a court order. Br.Opp. page 20. There is no description of what claimed facts rise to a conflict of interest in the Specification of Charges. Pet.Writ.Cert., Exhibit BB, App.194.

The Order finding Petitioner had a conflict of interest was not to be used as collateral estoppel. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 53. Pet.Writ.Cert., Exhibit A, App. 1 at 30.

C. Specification of Charges Fails to Allege Misrepresentation and Fraud.

This section of the Brief in Opposition cites no authority. Br.Opp. pages 21-22. Reference to ¶¶ 34-36,

44 and 45 of the Specification of Charges to say that Petitioner was put on notice of the misrepresentations fails to recognize that there was no allegation of a duty outlined in those paragraphs.[4]

The duty to notify federal courts of the rulings in the state court was created from whole cloth in the Opinion without citation. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 36, Pet.Writ.Cert., Exhibit A, App. 1 at 20. Failure to place Petitioner on notice of this charged transgression was a Due Process violation. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

The conclusion of the New Mexico Supreme Court in ¶ 46 of the Opinion that the rules of professional conduct were stated with specificity is of no moment. Br.Opp. page 22. Listing all Rules of Professional Conduct alleged to be violated in one paragraph is not adequate notice when no particular rule is connected to particular conduct.

D. No Discovery Tools Were Available.

Respondent claims that Petitioner failed to show he needed discovery. Br.Opp. page 23. Not being surprised by factual evidence is not notice as to a theory of what facts constitute a claimed violation of

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[4] This also ignores the fact that the Federal Court was, in fact, told of the state court's ruling by the attorney for the Guardian and Moody Bible. Petitioner, by losing the race to the federal courthouse, was disbarred.

a Rule of Professional Conduct. Interrogatories requesting what acts of Petitioner constituted violation of each claimed Rule of Professional Conduct would have clarified the issues for hearing. Each claimed violated rule, like a criminal statute, has specific elements that need to be proved.

E. Standard of Proof: Preponderance or Clear and Convincing.

This disbarment case is not, as Respondent claims, " . . . akin to an employment claim which traditionally uses the preponderance of the evidence standard." Br.Opp. page 26. Failure to apply the correct burden of proof is recognized as fundamental federal constitutional error in particular matters implicating the Fifth and Fourteenth Amendments. *See*, in the criminal context, *Neder v. U.S.*, 527 U.S. 1, 7, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), citing *Arizona v. Fulminante*, 499 U.S. 299, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (noting structual defects in the constitution of the trial mechanism.)

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) does apply. "This court has mandated an intermediate standard of proof – clear and convincing evidence – [as a matter of Due Process] when the individual interests at stake in a state proceeding are both 'particularly important' and more substantial than the mere loss of money." *Statosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 1396, 71

L.Ed.2d 599 (1982) (severing parental rights) quoting *Addington*.

Application of the incorrect burden of proof is fundamental constitutional error in this cause.

II. PETITIONER'S FIRST AMENDMENT RIGHTS WERE IMPLICATED.

When Petitioner claimed his First Amendment right to write and publish a Web Site when copies of the Web Site were being introduced below, it was an objection as to their admission.

Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436, 447 (1993), cited by Respondent is not on point. Br.Opp. page 26. The New Mexico Supreme Court concluded the content of the Web Site expressed disdain, contempt and displeasure towards the Disciplinary Board as a factor in aggravation. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 71, Pet.Writ.Cert., Exhibit A, App. 1 at 40. There is no connection that the Web Site content showed motive for, or actual violation of, any Rule of Professional Conduct as outlined in *Wisconsin*.

Protected speech cannot be used as a basis for official reprisal to aggravate punishment. *Crawford-El v. Britton*, 523 U.S. 574, 188 S.Ct. 1584, 140 L.Ed.2d 759 (1998) and *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006).

Likewise, *In re Kramer*, 282 F.3d 721 (9th Cir. 2002) is not on point. Br.Opp. page 27. Mr. Kramer was quoted in an article in *Lawyers Weekly USA* using crude street language to describe the charges against him and to admit he was willing to risk breaking the rules. *Id.* at 726, fn. 2. No statements remotely similar to Mr. Kramer's are attributed to Petitioner.

Using Petitioner's Web Site as done by New Mexico was a violation under the First and Fourteenth Amendments.

CONCLUSION

On the basis that the Specification of Charges did not adequately place Petitioner on notice as to the charges he was facing, this Court should, in the alternative,

A. Issue a summary disposition on the merits under Sup.Ct.Rule 16.1 to reverse the New Mexico Supreme Court and order the reinstatement of Petitioner to the State Bar of New Mexico based on *Ruffalo* violations, or

B. Grant the Petition for Writ of Certiorari and have the Clerk of the Court schedule this cause for full briefing.

Respectfully submitted,

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APP. FF

[LOGO]

THE STEIN LAW FIRM

[Address And Telephone Number Omitted In Printing]

October 14, 2005

Joel L. Widman, Esq.
Deputy Disciplinary Counsel
Post Office Box 1809
Albuquerque, NM 87103-1809

Re: Complaint of Hon. Linda M. Vanzi
Your Letter of October 12, 2005

Dear Mr. Widman:

At no time during the three hearings before Judge Vanzi in Case No. PQ-2005-00063 concerning Bruce C. Clinesmith in which this writer was involved was any sworn, live testimony presented before Judge Vanzi. No person adverse to this writer or his clients was ever subject to cross examination.

The fact that Judge Vanzi did not like the positions that this office took on behalf of clients in filed motions in her court is of no moment. Her job is to rule on the motions and enter orders accordingly.

Judge Vanzi is entitled to her opinion of the two federal cases filed by this office that concern the Clinesmiths. I disagree with her conclusions based on her incomplete out-of-court examination of the federal filings.

If Judge Vanzi felt that any actions of this writer were in violation of any order entered by the court, a Motion for Contempt should have been filed by the other attorneys in the case or Judge Vanzi should have issued her own Order to Show Cause why this writer should not be held in contempt. No attorney filed any such motion and Judge Vanzi did not issue any Order to Show Cause. When Judge Vanzi expressed her displeasure that I visited with Mr. Clinesmith without notice to any other persons or the court, as noted in her complaint letter, she entered an Order enjoining me from having any contact with Mr. Clinesmith. I have obeyed that Order.

If Judge Vanzi felt that her Order of August 5, 2005 somehow prohibited my actions with Mr. Clinesmith prior to the hearing of August 22, 2005, she should have held me in contempt – as noted above – and the Order of August 29, 2005 enjoining any further contact with Mr. Clinesmith by this writer or any member of this firm would have been unnecessary.

Mr. and Mrs. Clinesmith retained this office to represent both of their united interests in the guardianship case. Judge Vanzi seems not to understand that one suffering with dementia does not mean one cannot articulate their wants, desires and understand the need for and selection of an attorney for representation in court and for changing the testamentary disposition of their property. Further, having a diagnosis of dementia one can still understand that he or she and their spouse can have identical interests and goals for which only one attorney need be retained.

If it is now the position of your office that an attorney should disregard the expressed wishes of a client who may be suffering from dementia, please speak to Ms. Sally Scott-Mullins in your office.

It was Judge Vanzi's actions as a sitting District Judge on the Clinesmith case that were reprehensible and raises substantial questions as to her fitness for office. Here are just two examples:

First: Judge Vanzi complains about the motion filed on behalf of Mr. and Mrs. Clinesmith to open the hearing. I was representing Mr. Clinesmith when that motion was served and filed. This was done according to statute as quoted by Judge Vanzi. Quite to the contrary, it was Judge Vanzi who, upon denying the motion to open the hearing, let her friend Nancy Oriola, a principal of Decades, LLC into this "closed hearing" prior to appointing Decades, LLC as the temporary guardian and conservator of Mr. Clinesmith. This was in violation of the same statutes she quotes in her complaint letter.

Second: Judge Vanzi seems to have no concept of elemental Due Process under either the United States or New Mexico Constitutions. She entertained motions on short notice filed by parties adverse to clients represented by this writer. In fact, at the hearing of August 22, 2005 she ruled upon motions filed by parties adverse to this writer and his clients on less than two hours notice.

You should also be informed that in light of the above, as required by Rule 16-803.B of the Rules of Professional Conduct, this writer has been preparing a detailed complaint about Judge Vanzi to the Judicial Standards Commission. It will be filed upon completion.

Your office should allow the Court of Appeals to deal with all of these issues. This complaint should be dismissed.

Yours very truly,
THE STEIN LAW FIRM

by /s/ Stuart L. Stein
Stuart L. Stein

APP. GG

17-310. Answer.

A. **Contents.** The answer of the respondent-attorney shall contain the following:

(1) a brief and plain statement by the respondent reflecting his admissions, denials and any other relevant and material matter that he wishes to convey concerning each of the factual charges against him;

(2) any matter in mitigation in connection with any admitted violations; and

(3) the names and addresses of the witnesses that the respondent proposes to call in his defense.

B. **Filing and service.** Within twenty (20) days after service of the specification of charges, the respondent-attorney may file an answer to the charges. The answer shall be filed with the chairman of the hearing committee. Copies shall be served upon the members of the designated hearing committee and opposing counsel. Service may be by mail.

C. **Failure to answer.** If the respondent-attorney fails to answer the charges within twenty (20) days, in accordance with Paragraph B, or if the charges are not specifically denied in the answer, the charges will be deemed admitted. In this event, the sole issue to be determined by the hearing committee shall be the nature of the committee's recommendation to the Disciplinary Board after consideration of

any facts in aggravation or mitigation of the respondent-attorney's misconduct.

[As amended, effective May 1, 1986.]